

159 d.

R E P O R T S
OF
C A S E S

Determined in the
Court of King's Bench,

TOGETHER

With some other CASES;

FROM

Trin. 12 Geo. I. to Trin. 7 Geo. II.

WITH

TABLES of the NAMES of the CASES and
of the PRINCIPAL MATTERS.

VOL. II.

BY

THOMAS BARNARDISTON,
Serjeant at Law.

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13

R E P O R T S

C A S E S

Court of King's Bench

With some other Cases

FH
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THOMAS BARNARDISTON

Solicitor at Law

1835

A

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Hepworth and The Manucaptors of Pullen.

IN a Scire facias against Ball, one of the Defendant's plead- ed, that there had been no Capias taken out against the Principal, and upon this Issue was joined with a prout patet per Recordum. But notwithstanding this the Defendants delivered afterwards a Demurrer, which the Attorney for the Plaintiff accepted, but did not join in Demurrer. And now Mr. Agar moved, that the Court would set this Demurrer aside, upon account of its having come in irregularly. The Chief Justice was not in Court. Upon which Judge Page said, that if the Plaintiff had not accepted of the Demurrer, he might have signed his Judgment; and so he observed, it had been determined; but by accepting of it, there is a Discontinuance made in the Proceedings; for which Reason he thought, the Plaintiff could never have Judgment. Accordingly the Court made no Rule.

How far the Court will not set aside a Demurrer.

Vide post a.

The King and Adams.

MR. Strange moved for a Rule upon the Clerk of the Peace of the City of London to pay the Costs, which he had occasioned by returning an Indictment with a Caption Anno quarto, whereas it should have been Anno tertio, upon a Certiorari to theittings of Nisi prius at Guild-Hall; by Means of which the Defendants was acquitted there. Accordingly the Court made a Rule to shew Cause. Chief Justice absent.

How far the Court will order an Officer, whom a Writ is directed to, to pay the Costs.

The King and Empson.

How far the
Court will
quash an
Order of
Sessions.
Vide post.

MR. Agar moved to quash some Orders of Sewers upon an Exception, that the Fact was only laid by Way of Recital, with a quod cum ad hanc Sessionem presentatum fuit. Accordingly a Rule was made to shew Cause. Chief Justice absent.

Anonymus.

How far a
Prosecutor
shall be ob-
liged to give
a Note in
Writing of
his Place of
Abode.

MR. Wirley moved, that the Prosecutor might give a Note of the Place of his Abode; and that after Plea pleaded, Judge Page doubted, whether this Motion was not now too late. But Judge Probyn said, an Act of Parliament has allowed it; and therefore he thought it might be made at any Time. Accordingly Judge Page pronounced the Rule, that the Prosecutor should do it. Chief Justice absent.

Hepworth and The Manucaptors of Pullen.

Vide ante
1.

THREE Persons had been Bail in this Case, and upon a Scire Facias brought on the Bail-piece, two of them had pleaded no such Recognizance. However M^r. Cunningham came now and informed the Court, that though the Names of these two Defendants were put into the Recognizance, yet in Fact they were no Ways privy to it. And therefore he moved, that it might be referred to the Master to inquire, whether they were privy to this or not. Accordingly the Court made a Rule, that it might be so. Chief Justice absent.

Vide post.

Anonymus.

How far the
Court will
give Liberty
to plead
three Pleas.

What shall
be said to be
a Plea in
Bar or the
Substance of
it and not in
Abatement.

IN an Action brought upon a Promissory Note by Sawbridge, one of the South-Sea Directors and another. Serjeant Chappel moved, that the Defendant might plead three Pleas, Non Assumpsit, Non Assumpsit infra sex Annos, and the Statute of 7 Geo. 1. which vests the Estates of these Directors in the Hands of Trustees, and makes the Directors incapable of bringing any Action themselves, or of having any brought against them. M^r. Fazakerly objected on the other Side, that this last Plea was in Abatement and not in Bar; for which Reason he submitted it, it was not within the Statute for the Amendment of the Law, which allows of pleading double. But the Serjeant said, it had been determined, that this was a Plea in Bar. And Judge Page observed, that if a Man promises to do, and one of them Releases, this is a discharge against all. Accordingly the Motion was allowed. Chief Justice absent.

Bird and Philips.

ON Rule to shew Cause, why the Defendant should not have Liberty to withdraw his Plea, and likewise to plead double. Mr. Reeves said, that the Case was, that an Action of Covenant was brought to recover the Penalty contained in certain Articles of Agreement, relating to Putney-Bridge; the Purport of which Articles amongst other Things was, that if the Defendant should happen to be appointed by the Commissioners to build the Bridge, the Plaintiff should have a Share in it. Now the Declaration charged, that the Defendant was appointed to build it by the Commissioners; but that he had not let the Plaintiff have a Share in it. To this the Defendant pleaded Nil debet, and upon that the Plaintiff demurred, and gave a Rule for joining in Demurrer, which would have been out before the End of the last Vacation; but the Defendant did join in Demurrer in Time. And the first Day of this Term Motion was made, that the Record might be a Concilium. Notwithstanding this the Defendant obtained the same Day this Rule for shewing Cause, which he hoped, according to the State of this Case, there was no Foundation; for Serjeant Chappel on the other Side said, that if the Defendant had not joined in Demurrer, it would have been beyond all Question clear, that the Rule for shewing Cause had been proper; so that the Joinder in Demurrer is the only Thing, which makes the Difficulty. And as to that, he said, the Defendant was under a necessity of doing it, otherwise Judgment would have been signed against him. He did agree it might be said possibly, that the Defendant should have taken out a Summons at a Judge's Chamber to have got the Time enlarged for signing Judgment; but he observed, that all the Judges of this Court were at that Time out of Town; and therefore that Objection was sufficiently answered. Then as to the Record's being made a Concilium, he said, Mr. Reeves had agreed, that this Rule was made the same Day, and the Court would not inquire which Motion was made first. The Chief Justice and the Rest of the Court declared themselves to be of the same Opinion; and accordingly the Rule was made absolute.

N. B. The Pleas were, that there was no such Covenant in the Articles; and likewise that the Commissioners did not appoint the Defendant.

Robinson and Tool.

MR. Theede made a Complaint to the Court, that the Plaintiff had put in a prolix and impertinent Declaration; for he had made four Counts upon one and the same Note, by laying it only over different Ways, and likewise had two other Counts upon an Indebitatus Assumpsit, and two more upon a Quantum meruit; whereas in truth that single Note was the only Matter in Question. For which Reason he moved, that it might

How far the Court will give Liberty to withdraw a Plea.

How far the Court gives Liberty to plead double.

How far the Court will direct that some of the Counts in a Declaration shall be struck out.

be referred to the Master to inquire, whether these Counts were for one and the same Cause of Action. Accordingly the Chief Justice absent, the Court made that Rule.

Anonymus.

How far the Courts of Law will grant a Prohibition in a Suit relating to an Administration.

MR. Robinson moved for a Prohibition to be directed to Mr. Bettelworth for first granting Administration to Mrs. Harrison, Sister to the Deceased, and afterwards citing her to New Cause, why those Letters of Administration should not be revoked, and a new Administration granted to Mrs. Welden, supposed to be the Deceased's Wife. He said in the Case of Sir George Sands, Sid. 179. this was finally settled, that though the Ecclesiastical Courts have it in their Election either to grant the Administration to the Wife or the next of Kin; yet when they have granted it to one of them, they have executed their Authority, and cannot afterwards grant it to the other. Judge Page said, where-ever there is a nearer of Kin to the Deceased, than the Person to whom those Courts have granted Administration, they may certainly revoke it, and grant a new Administration to the nearer of Kin. He said likewise, that they may revoke such Administration, where a Will happens afterwards to be found. But on the other Hand he observed, the Rule was undoubtedly certain in the Construction on the Statute of Hen. 8. that where those Courts have granted it to the Wife or next of Kin, they cannot afterwards grant it to the other. Accordingly, the Chief Justice absent, he made a Rule for Newing Cause, why a Prohibition should not be granted.

Vide post.

Squire and Archer.

How far Money cannot be brought into Court where the Damages are very uncertain.

IN an Action upon the Case for Dilapidations, Mr. Lambert moved, that Money might be brought into Court and struck out of the Declaration. But Judge Page said, these Motions are never granted, where the Damages are so very uncertain. And therefore never allowed in Covenant for want of Repairs. He said too, that formerly these Motions he has known refused even in Quantum meruit. Accordingly, the Chief Justice absent, the Court thought proper not to make any Rule.

Wilcox and Huggins.

THIS Matter now coming on to be argued again, the Court declared themselves unanimous in Opinion, that where-ever the Statute of Limitations takes place in the Time of a Testator it shall run on in the Time of the Executor; and though the Action brought by the Testator to take the Case out of the Statute cannot properly be said to be continued in the Time of the Executor, yet the Executor must commence his Action within a reasonable Time after the Probate of the Will; and so must an Administrator within a reasonable Time after Letters of Administration granted, of the Reasonableness of that Time the Court, they said, were the proper Judges. The Chief Justice and Judge Lee declared their Opinions to be, that the Statutes prescribing a Year as a reasonable Time in another Case was a proper Rule to guide the Discretion of the Court in this. But, as in the present Case the Plaintiff had lain by a very unreasonable Time, the Court pronounced their Judgment for the Defendant.

Vide ante
Vol. 1. 335.
349, 382.

Barcley and Howard.

UPON a Writ of Error on a Judgment by Default in the Common Pleas in an Action upon several Promises, want of an Original and Warrant of Attorney was assigned for Error. The Defendant in Error came in Gratis and pleaded *In nullo est Erratum*, which his Counsel now agreed was a Confession of the Errors. But yet submitted it, that the Court might award Certiorari notwithstanding *ad informandam conscientiam Curie*; and the fact he said, was, that there were both an Original and a Warrant of Attorney. The Court accordingly declared their Opinions to be, that though the Party confesses an Error, where there is none, they may award a Certiorari in Affirmance of a Judgment, according to the Case of *Carlton and Mortagh*, which is in *Salkeld* 268. But yet they thought it necessary, that there should be some Evidence given them, that there was an Original and a Warrant of Attorney. Upon which the Defendant in Error's Counsel said, he had an Affidavit to that very purpose; and accordingly the Court immediately granted one Certiorari to the Chief Justice of the Common Pleas, and another to the *Custos Brevium*. And a few Days after in the Case of *Smith and Dod*, the Court ordered the Cause to stand over in the Paper for the like Reason, though the Party had not such Affidavit present.

When a Writ of Error is brought, how far a Certiorari may go to inform the Conscience of the Court; notwithstanding the Party has confessed the Error.

When a Writ of Error is brought and the Defendant comes in Gratis, and pleads *In nullo est Erratum*, how far that shall be a Confession of the Errors.

Douset and Hayward.

The Manner
of declaring
against a
Filiizer.

THE Plaintiff declared against the Defendant, as Clericus Domini Regis coram ipso Rege; to this he pleads, that he was a Filiizer of this Court, absque hoc, that he was Clericus Domini Regis coram ipso Rege; and to that the Plaintiff demurs. Mr. Strange was now Counsel for the Defendant, and said, that he submitted it in Point of Law, the Defendant was not one of the Clerks of the Court. But admitting he was, yet he ought to have been described by the proper Name of his Office by which he was admitted and entered in the Book, which is kept for this Purpose. He did agree, that in Suits against Attornies against the Chief Clerk, and the Clerks of the Chief Clerk, this general Appellation, by which the Defendant was declared against was sufficient. But in all other Instances, where Officers of the Court are sued, he submitted it, they must be sued by the proper Name of their Office. The Court said, it was very true indeed, a Filiizer is not a Clerk belonging to the Chief Clerk, the Business of which Persons is Ad Placita irrotuland; but he is a Clerk of the Court. Then as to the other Point they thought it not material by what Name a Filiizer is entered in the Book; but as he is in Judgment of Law a Clerk belonging to the Court, they thought he might well be sued by that Name. And accordingly ordered a Respondeas Oußer.

Anonymus.

How far the
Court will
not give Li-
berty to re-
join double.

MR. Acherley moved for Liberty to rejoin double, as being within the Equity of the Aa, which allows pleading double. But the Court said, that they thought, this would be entirely inconvenient, and out of the Reason of the Aa; and therefore refused it.

The King and Clendon.

How far the
Court will
not give
Liberty that
the Informa-
tion may be
amended, by
reason that
the Amend-
ment would
amount to
changing the
Venue.

THIS was an Information, that had been granted against the Defendant for beating one Captain Berg, who was a Prisoner of his, in a very unmerciful Manner. In laying the Fact in the Information there was a Doubt conceived, whether it should have been charged to have been committed in London or in Middlesex; because Part of the House, where it was done, stood in one County and Part in the other; and it was uncertain, whether that Part of it, where the Fact was done, was in the one County or in the other. However at last they thought proper to lay it in London, and accordingly the Cause was carried down to Trial. But upon farther Enquiry they were satisfied, it was in Middlesex, and therefore would not go on to Trial at that Time. Upon which Mr. Theede moved now, that the Information might be amended in this Respect by laying the Fact in Middlesex.

Middlesex. The Chief Justice said, he has known Informations often amended after the Cause carried down to Trial; and therefore made a Rule to shew Cause. But afterwards it was discharged; for they said, if this Motion was allowed, they should change the Venue.

Young and Cain.

ON Rule to shew Cause, why an Attachment should not go against one Popham and others, for rescuing the Defendant, who was arrested upon a Non omittas, which ran into the Town of Bridgwater, and at the same Time asserting, that no such Process would run there; M^r. Strange said, that he should submit it, that this Motion was not proper, barely upon account of the Rescous, till that should be returned. He did agree, that these Motions have some Years ago been granted without such Return; but in Salk. 546. and in the Case of Sheder and Holt, Mich. 9 Geo. 1. it was held they might not, where the Rescous is supposed to be upon mean Process. And in the Case of Grinley and Foulter, Hill. 11 Geo. 1. it was settled upon Debate. Then as to the Words, that were supposed to be spoke at that Time, if they should be thought a Contempt, and to the Attachment applied for upon that account, he said, they were positively denied. M^r. Fazakerly on the other Side, said, that he submitted it, that it would be a Matter greatly inconvenient, to require in all Cases a Return of a Rescous; for if an Action should be brought for a false Return, in such Case the Sheriff's Bailiffs could not be Witnesses for the Sheriff to support his Return; because they all give Security to him; and in the Event it might happen that such Security would be liable. The Chief Justice said, that whatever might be pretended to be the Inconvenience of requiring a Return of the Rescous in these Cases, the Law was certainly so settled, and he was not from departing from it. He said farther that he knew, the ancient Practice was so too; and in such Case there is always a small settled Fine of course set upon the supposed Recousers. And Judge Page said, an Attachment is many Times granted for not paying it. Then as to the supposed Mischief to the Sheriff of requiring this, he said, it was well known, there are generally Bailiffs Followers present upon an Arrest, who may be good Witnesses for the Sheriff, though the Bailiffs themselves may not. In the Exchequer, he said, he did agree, the Practice was not to require this; and there the Course is only to make a Rule to shew Cause, where there is no such Return, and to make the Rule absolute directly, where there is. Then as to the Words, he said, if they were not denied, he should not have been for granting an Attachment; because they are only Assertions of a Privilege belonging to the Parties. But as they were denied, the Court agreed clearly the Attachment ought not to go. And accordingly the Rule was discharged.

How far the Court will not grant an Attachment for a Rescous

The

The King *and* Abel.

What shall
not be a good
Conviction
upon the
Turn-pike
Act.

THIS was a Conviction against the Defendant upon a Statute made 12 Geo. 1. for not accounting as Collector of a Turn-Pike. And the Exception taken to it by Mr. Fazakerly was, that it does not appear by the Evidence, as set forth in the Conviction, that the Witnesses swore the Defendant to be Collector. He did agree, that this was charged in the Information, and that in the Conclusion it is said, *super quo*, and the Information being read to the Defendant, and he hearing what was said, *Nil dicit*; which might seem to supply the Defect of the Evidence being not set forth more fully. But he insisted, it could not; for that no Intendment shall be allowed in a Matter of this Nature. The Chief Justice said, if it had been averred, that the Defendant confessed the Fact as set forth in the Information, that would have supplied the Defect in setting out the Evidence; because when the Party has confessed the Fact, all other Evidence is unnecessary. But a *Nil dicit* is only a not contradicting, which is not sufficient of itself, and therefore the setting forth, that there was Evidence given, was necessary. Accordingly the Court made a Rule for quashing the Conviction *Nisi Causa* within a Week.

Anonymus.

How far the
Court will
grant an In-
formation a-
gainst a Ju-
stice of Peace
for making
an undue
Return of a
Conviction.

SErjeant Baynes moved for an Information against Sir John Shaw, a Justice of Peace for the County of Kent, for returning up a Conviction contrary to the Truth. This was a Conviction for Killing a Horse without a Qualification; the Conviction, he said, was made on the Evidence of one Mann, who was likewise the Informer, and one Society of the Penalty is given to him, the other to the Poor of the Parish; but, because Sir John was unwilling that Part of the Penalty should appear to have been given to the Witness, he returned in the Conviction one Cox to be Informer. And upon this the Court made a Rule to shew Cause.

Vide post

Harrison *and* Mitchel.

Vide ante

MR. Fazakerly came now to shew Cause; and said, that he did agree, in general, the Rule was as has been laid down in the Construction upon the Statute of H. 8. but that Rule was intirely founded upon this, that when the Ordinary had made his Election, which of the Parties he will grant the Administration to, he shall not afterwards depart from it. But in the present Case the Fact was, that he had not an Opportunity of making his Election, the State of the Case being untruly laid before him by the Affidavit of Mr. Harrison. For he had represented the Case to be, that Mr. Welden died a Bachelor. Whereas Mr. Fazakerly said, that he had an Affi-

Affidavit now to produce, to shew that M^r. Harrison must have known M^r. Welden was married to the Defendant, notwithstanding the other Side were pleased to give her the Name of Mitchel in the Rule, that they drew up for shewing Cause for the Prohibition. M^r. Reeves on the other Side argued, and said, that he believed the Fact was intirely different from what it was laid to be by the Affidavit, that has been read; and therefore he hoped, he should be allowed Time to answer it. But he observed, if the Fact was even as it is alledged to be, yet still the Prohibition ought to stand; for in all Cases of granting Administration there is a general Citation, that goes out and is stuck up upon the Royal Exchange to require all Parties to come in, that are any Ways interested. The Court declared themselves to be unanimous, that it was intirely against the Practice of the Court, when a Rule is shewn Cause upon, to allow subsequent Affidavits to be filed by the Party obtaining it. But as to the Principal Question the Court were divided in their Opinions. The Chief Justice and Judge Page thought, that the Rule should be discharged; for that the Ordinary had not had an Opportunity of making his Election. But Judge Probyn and Judge Lee said, that they doubted, whether this Case any Thing differed from that of Sir George Sands, which was quoted upon the former Argument. For they said, they believed, there must have been an Affidavit in that Case, made by the Children requesting the Administration, that the Deceased died leaving no Widow. And this they took to be the Practice of the Ecclesiastical Court. Accordingly the Court said, that it might be proper to inquire farther into that Case. And therefore the Rule was enlarged.

Vide post

Dr. Bently and The Bishop of Ely.

THE Chief Justice delivered now the Resolution of the Court; and said, that the single Question was, whether upon this Record the Prohibition ought to stand. The Citation, he observed, was as Special Visitor over the Master; for the Words of it were, You Richard Bentley, Doctor of Divinity, are required to appear before me, Thomas, Lord Bishop of Ely, Visitor, specially authorised by the 40th Statute of Queen Elizabeth, given to Trinity College, and empowering me to examine and correct the Behaviour of the Master. But, he said, upon this Record the Bishop of Ely sustains general Visitor over the whole College by the Statute of Edw. 6. and therefore the Citation is founded Wrong. The Court would not pronounce their Judgment, how far Queen Elizabeth had it in her Power with the Consent of the College to controul the Bishop's Power of Visitation; but this they did determine, that, if he had such Power, he did not make Use of it. For the Intent of this Statute of 40 Eliz. evidently was to leave the Bishop's Power of Visitation at Large over the whole College, as it was by the Statute of Edw. 6. and only to give some Directions as to the Exercise of it, particularly relating to the Master. For which Reason the unanimous Opinion of the Court was, that

Vide ante
Vol. 1. 192,
388, 451.

upon this Record the Prohibition ought to stand. But in Easter Term after, the Judgment was reversed by the House of Lords.

Walker and —

How far the Court will not punish a Sheriff for taking Goods to an excessive Value under an Execution.

MR. Parker moved, that the Sheriff of Gloucester might answer the Writters of an Ambarit, for taking Goods to the Value of an excessive Sum in Levying an Execution of a small Value. But Judge Page said, he has known these Motions often refused, and the Reason the Court has always given in these Cases is, that the Defendant might have bought the Goods himself of the Sheriff, or have got some Friend of his to have bought them for him. Accordingly the Court refused the Motion in the present Case.

Fisher and Hughes.

Vide ante Vol. I. 464.

THIS Matter coming on to be argued again, Judge Lee said, that he believed, the Objection taken by Mr. Strange might be got over, by considering the Words *cetera præmissa* to relate to the other two Terms demised; but yet he thought, the following Words of the Judgment were much more to be objected to; for they are *sed querens sit in Misericordia pro falso clamore suo versus præfatum Willielmum Fisher pro prædictis Tenementis*. But Mr. Fazakerly answered that Objection this Way, that the Amercement must be for a Wrong, done by the Plaintiff, relating to these Tenements; and therefore he submitted it, the Judgment was well enough in this Respect likewise. Accordingly the Chief Justice with Judge Page and Mr. Justice Probyn, affirmed the Judgment.

Goodtitle and Pettoe.

What shall he said to be a good Covenant to stand seised to Uses.

IN an Ejectment upon the Demise of one Thornton, a Verdict was given for the Plaintiff, subject to the Opinion of the Court upon the following Case. One Angeloe Buck was seised in Fee of the Premises in Question, and by Deed bearing Date the 20th of June, 1702. covenanted with Hockley and Elliot and their Heirs in Consideration of the Love he bore to his Wife Anne Buck, and to make a Provision for her in Case she should survive him, and for other Uses limited in the Deed, to stand seised of the Premises, lying in the Parish of Guilford, to the Uses following, viz. to the Use of himself and his Wife for their Lives and the Life of the longer Liver of them, and after their Decease to the Use of the Heirs of the said *Angeloe Buck*, on the Body of the said *Anne* lawfully begotten, and then to the Use of such Persons as the said *Anne* should dispose the same; and for Want of such Disposition, then to *William Thornton*, the Plaintiff and his Heirs. It was stated farther in the Case, that

that Thornton was Nephew to the said Angeloe Buck; that Anne survived her Husband without Issue of their two Bodies; and that after the Decease of her said Husband, she by Writing disposed of the Premises to the Use of herself for Life, the Remainder to Jones Malpells, who was her Sister, under whom the Defendant claimed. Anne died. And now the Question was, whether Judgment should be for the Plaintiff, or for the Defendant. Serjeant Darnel argued for the Plaintiff, and said, he should submit it, that by the Rules of Law no Person can take Advantage of a Use, raised by a Covenant to stand seised, unless there is some Consideration in the Deed arising from him. And to this Purpose is the second Resolution in Mildmay's Case 1 Rep. 176. b. 1 Lev. 30. and 2 Ver. 7. The Consequence of which, he submitted it, was, that the Defendant could not claim under this Deed; for there is no Consideration in the Deed arising from her; and she is in from the Covenantor, and not from the Wife. Mr. Marsh on the other Side argued, and submitted it, that the Construction of Uses was the same with the Construction of Wills, to be governed according to the Intent of the Parties. And so the Rule is laid down in Coke Lit. 49. a. and in Carth. 343. And, he said, the Intent of the Partie in this Case manifestly appears, that the Uses should be raised for the Benefit of the Wife; and therefore, he submitted it, they well might. Then as to the Wanting a Consideration to raise the Uses in the present Case, there was a very good one; for it appears these Uses were to be raised for the Wife's Benefit. And to this purpose he mentioned a Case out of Roll's Abridgment, 783. He said farther, that if there was any Weight in this Objection, the Objection would equally hold against the Plaintiff's Title. For there is no Consideration in the Deed arising from him. In the Case indeed it is stated, that he was of the Blood of the Covenantor; but nothing of that is mentioned in the Deed; and how far an Averment of a Matter dehors would be good in this Case, he has submitted it to the Judgment of the Court. But besides, if it had appeared in the Deed, that he was of the Blood, that would not have been sufficient neither; for it is not mentioned in the Considerations of the Deed, that the Promoting those of his Blood was any Part of them. He said likewise, that if this Power of the Wife was void, that would be another Objection too against the Plaintiff's Title; for then it would be uncertain, when his Estate should commence; and so is the Opinion, he said, in Chedington's Case, 1 Rep. 154. The Court inclined to think, that the Limitation of the Power to the Wife was a void Limitation; and said, that they took it, the Distinction was settled between a Covenant to stand seised, and other Conveyances; and that upon a Covenant to stand seised, no Uses could be drawn out of the Covenantor, but upon an express Consideration arising from the Party, so drawing them out. But they all agreed, if the Remainder had been limited to the Wife and her Heirs, the Heirs might well take; for in Judgment of Law, a Person's Heirs are included in the Person himself. And Judge Page said, he was of Opinion, if the Limitation had been to her and her Heirs, to be disposed of to such Persons as she should think proper, and afterwards she had disposed

disposed of the Uses to other Persons, those Uses would have been well raised and drawn out of the Covenantor. Then as to the Plaintiff's Title, they said, they did not think there was much Weight in that Objection against it, in relation to the Time of its Commencement; but if the Limitation of the Power was void, the Plaintiff's Estate would commence from the Death of the Husband and Wife without Issue; and that the Case cited to support the Objection was, when considered, really against it. However they said, there was a good deal of Weight in the other Objection, relating to the Want of a Consideration. They did agree, if one of the Considerations in the Deed had been the Love and Affection to his Family, tho' it had not been averred in the Deed, that the Plaintiff was of his Family, that might have been averred by Matter dehors, but they thought an Averment of both Matters, viz. that that was Part of the Consideration, and that the Plaintiff was within that Consideration, could hardly be admitted. However the Matter was ordered to stand over.

Vide post

Holt and Ward.

Vide ante
Vol. 1. 333.

MR. Reeves now argued for the Plaintiff. He said, the single Difficulty for the Court to determine upon this Record was, whether there is a sufficient Consideration appearing to found the Promise upon, which the Action is brought for. The Objection against it has arisen from the Infancy of the Plaintiff at the Time the Promise was made to her. But that Objection he submitted it, would not have a great deal of Weight; inasmuch as the Promise made on the Part of the Infant, which was the Foundation of the other, for the Reasons, which he should offer, would, he hoped, appear, not to be void, but only voidable. And if that could be made out, he believed, the Counsel of the other Side would not contend, but it must be a sufficient Consideration. In order to shew then, that this Promise, made on the Part of the Infant was not void, he apprehended, that there was this Distinction in the Law; that where the Promise is of such a Nature, as to carry with it an Appearance of Benefit to the Infant, it is only voidable; where indeed it carries with it an Appearance of Prejudice to the Infant, it is absolutely void. For this Reason he did agree, that in the Case of Barker and Medlicot, Trin. 9 Anne, at Nisi prius, Lord Chief Justice Holt was of Opinion, that an Infant might bring Trover for Money won of him at play, and the Receipt of the Money was a Conversion. That Action indeed was an Assumpsit, and Lord Holt was of Opinion, that such Action would not lie for the Money; accordingly the Infant was there nonsuited. So he agreed, if a Lease is made by an Infant without reserving any Rent, the Lease is void. And to this Purpose is 3 Cro. 220. But if a Lease is made by an Infant, reserving Rent, this is held in 1 Cro. 306. to be only voidable. So in 2 Cro. 320. a Reservation of Rent upon a Lease made to an Infant is adjudged to be the same. He observed, that upon a former Argument of this Case, a Distinction was offered to be made by the Gentle,

Gentlemen that argued for the Defendant, between Contracts executory and Contracts executed. And they did agree, if an Infant carries his Promise into Execution, that may be a good Foundation for him to make the other Party carry his into Execution likewise. But he submitted it, that that Distinction could not be maintained; for if the Promise made on the Part of the Infant is void, it is impossible the carrying such Promise into Execution can signify any Thing. And if the Promise is voidable only, the Party, to whom it is made, shall not render it ineffeual; the Infant himself only can do that; and to this Purpose he relied upon Sid. 41. which he apprehended to be an Authority full in Point for him. But besides, in the present Case, he observed, it was impossible in the Nature of the Thing, that the Infant should have carried her Promise strictly into Execution, to intitle her to a Remedy against the Defendant for a Breach of his. For then she must have married him, which would have been a Performance of the Promise on both Sides. However she has done as much as was in her Power to carry her Promise into Execution; she has requested the Defendant to marry her; and he has refused. Serjeant Eyres spoke on the other Side, but seemed not to be able to answer these Arguments. Accordingly the Court ordered this Matter to stand farther over, without delivering any Opinion themselves.

Vide post

J. C. 173. 176.

The King and The Inhabitants of Luthborough.

IN a Presentment for a Nuisance, Mr. Abney moved on Behalf of the Prosecutor to have a View, and likewise that a Rule might be entered into by Consent, that no Advantage should be taken on the Trial of this Presentment at the Assises of any Defect in it for Want of Form or Substance. The Court said, that the View must certainly be granted. But they thought, it was very extraordinary to bind the Judge of Assise by the last Part of the Rule, tho' it was even by Consent. However at last they made that Matter Part of the Rule likewise.

What Things the Court will order to be done with the Consent of Parties.

Gordon and Martin.

THIS was an Indebitatus Assumpsit upon a Promise made by the Defendant to pay the Plaintiff 300l. for Work and Labour done for him. And upon the Evidence the Fact came out to be, that the Defendant's Brother employed the Plaintiff to sell a considerable Estate for him in Ireland, and that the Plaintiff's Livelihood was to do Business of that Nature. Accordingly the Plaintiff attended the Earl of Shelburn several Times in laying before him a Proposal of this Estate, and in bargaining with him about it. Whilst this Transaction was depending, the Defendant himself writ a Letter to the Plaintiff in the following Words. My Brother desires to treat with Lord Shelburn for selling him the late Mr. Bagnall's Estate in Ireland, and if he goes on with the Purchase, you may depend upon a handsome Gratuity from my Brother; which, I assure and promise you, shall not be less than 300l.

How far a general Indebitatus Assumpsit will lie.

There was a Postscript to the following Purpose; My Intention is that the Money shall be paid you upon executing the Writings. The Plaintiff afterwards concluded the Purchase. And upon this Evidence the Jury gave a Verdict for him for the 300l. And now Mr. Strange moved for a new Trial; in the first Place, for that the Defendant appears only to have transacted by Authority from his Brother; and in the next Place, admitting an Action would lie against the Defendant, a general Indebitatus Assumpsit could not possibly. The Court was of a different Opinion as to both Points. They said, they thought it clear, that no Action could lie upon this Promise against the Defendant's Brother; because it by no Means appears, that the Defendant had any Authority from him to write this Letter, by which the Promise was made. But the Defendant himself must certainly be bound to perform it; for he has expressly undertaken, that the Promise shall be performed. They said too, that they thought the Plaintiff had declared against the Defendant in a proper Manner. He has declared for 300l. promised by the Defendant, for Work and Labour done for him. The Work and Labour was done for another at his Request; and surely that upon the Matter is Work and Labour done for himself. Accordingly the Court refused to grant a new Trial.

Smith and Jones.

What Words
are action-
able which
are spoken of
a Tradesman.

IN an Action of Slander the Plaintiff declared, that he was a Timber Merchant, and that the Defendant, speaking of him in his Way of Trade, said, He is a Rogue and a Villain, he has cheated me of 14l. Serjeant Glide moved now in Arrest of Judgment, that these Words were not actionable. But Serjeant Chapel on the other Side cited a Case out of 1 Roll's Abridgment 62. in Point. Accordingly the Court gave Judgment for the Plaintiff.

Woolaston and Walker.

Vide Vol. 1.
423, 467.

THIS Matter coming now on to be argued by Mr. Dennison on the Part of the Plaintiff, and by Mr. Peere Williams on the Part of the Defendant, the Chief Justice with Judge Page and Judge Probyn declared their Opinions to be, that this Case of Administration, Pendente Lite concerning the Probate of a Will, was of the same Nature with the Common Cases of Administration, durante minore Aetate, & durante Absentia. They did indeed think, that none of them were within the Design of the Statute relating to Administrations; but that they were necessary sometimes to be allowed of. And as to the Case in Carth. they said, the Court did not give Judgment in it. But Judge Lee said, that his Opinion was at present different; and thought, that this Case might in Reason differ from the others. For in the others the Administration is always granted cum Testamento annexo, and it is upon the Matter the same Case, as if the

the Deceased had declared, that he would have no Executor for such a Time; but in this Case the Administration cannot be granted so; for the Dispute is, whether there is a Will or no; and to grant Administration with the Will annexed, would be to affirm that there was one. So likewise it is wrong to grant Administration without the Will; for that is to affirm, that there is no Will. For which Reasons he thought, no such Administration ought to be granted at all, according to the Case in Car. which has been cited. Accordingly the Court ordered this Matter to stand over again. Vide post.

Harrison and Mitchell.

THIS Matter coming on again, Mr. Robinson observed, that the Affidavit produced on the said Cause was not titled in any Cause; and therefore it ought not to have been read; and as to what might be said, that this Objection should have been made at the Time the other Side came to the Cause, he took Notice, that they had no Copies of the Affidavit at that Time; and therefore they were not prepared to make this Observation upon it. Mr. Strange on the other Side said, that there was the same Objection to be made to the Affidavits, that were produced at the Time of the first Motion for the Prohibition. They were not titled in any Cause; but they ought to have been so; because it is supposed, that the Suggestion is filed upon Record before that Motion; and indeed, strictly speaking, a Prohibition cannot be moved for without it. Accordingly the Court discharged the Rules that had been made on both Sides; and ordered the Prohibition to be moved for de novo. Vide ante

Chase and Slaughter.

UPON a Writ of Error on a Judgment in the Palace Court, Mr. Agar took an Exception to the Pleint, that it was not alledged in it, that the Cause of Action arose within the Jurisdiction. In the Declaration he did agree it was; but the Pleint is in the Nature of an Original; and therefore it ought to have been alledged there likewise. But Mr. Benny on the other Side observed, that the Form of all the Records out of the Palace Court are the same with this; and in Saund. 87. it is so in a Writ of Error upon a Judgment in the Court of Bristol. The Court said likewise, that the Pleint it self is not sent up upon a Writ of Error; but only a short Recital of it; and accordingly the Judgment was affirmed. What shall be said to be a good Pleint in an Inferior Court.

Hodington and Pinkard.

How far a
Court of
Law will not
relieve in
Case of an
Execution,
but will leave
the Party to
his Remedy
in Equity.

MR. Fazakerly moved, that the Sheriff might have Liberty to amend his Return. He stated the Case to be, that the Plaintiff together with A. had two Judgments against another, and sued out each of them several Writs of Execution; that both of these Writs were delivered to the Sheriff the same Day; but that the Plaintiff's Writ came to the Sheriff's Hands first. The Sheriff upon this made out a Warrant to his Bailiff to levy the Money upon both of them; but there being not Goods enough belonging to the Party, on whose Estate the Execution was levied to satisfy the Whole of both Demands, A. proposed to the Sheriff, that if he would satisfy the Whole of his Demand, he would indemnify him, which accordingly was done; and the remaining Part of the Money was delivered to the Plaintiff to satisfy as much of his Demand, as it could satisfy, and a Return made of Nulla bona as to the rest. The Plaintiff afterwards commenced an Action against the Sheriff for this false Return, insisting, that his Execution ought to have been first satisfied wholly. And upon that the Sheriff got the Money back again from A. to pay the Plaintiff, and delivered him up his Bond of Indemnity. A Commission of Bankruptcy was afterwards taken out against the same Person, who had had the two Judgments recovered against him, which overreached both Executions. And upon this A. applied now to the Court, that the Return of Fieri feci, which was made as to him, might be rectified, and made according to what in Truth it ought to have been; in order that he might come in as a Creditor under the Commission. The Court said, that they had never given Relief in a Case of this Nature, where the Interest of Strangers is to be affected; and therefore left him to his Remedy in Equity.

The King and Theede.

What shall
not be said
to be a good
Conviction.

THIS was a Conviction made by two Justices upon the Statute of 11 Geo. 1. relating to the better making of Candles; and for that Purpose provides, that all Tallow Chandlers shall give Notice in Writing of the Number of Candles, of the Number of Sticks and of the Number of Courses, which they intend to make; and this Notice is appointed to be given to certain Officers so many Days before the making. The Information then, which was taken before the Justices set forth, that the Defendant had not given this Notice either of the Number of Candles, of the Number of Sticks, or of the Number of Courses; and thereupon the Conviction concluded, that this Fact was fully and duly proved before the Justices; upon which he was ordered to pay the Penalty of 20 l. and a Warrant issued out for this Purpose. The Defendant upon this appealed to the next General Quarter Sessions; the Justices there were in Doubt, whether they had Jurisdiction upon the

the Appeal; however the Conviction was filed, and nothing more at that Time done. At the Sessions after the Justices considered of this Matter again, and then upon Debate were of Opinion they ought to go on upon it. Accordingly at last they quashed this Conviction. The Form of which Order was; whereas an Appeal has been made unto us from a Conviction, Order or Warrant of two Justices made upon the Statute that has been mentioned; and it being made known unto us by the Oath of one Witness, that the Defendant did give Notice to the proper Officer of the Number of Courses of his Candles in Manner as the Statute directs; We do therefore set aside the Conviction, and order it to be null and void. Upon this a Certiorari was awarded to remove up both Orders; and now upon the Return the Attorney General argued on the Behalf of the Prosecutor, and prayed, that the Order of Sessions, quashing the Order of two Justices, might be quashed itself, and that the Order of two Justices might be confirmed. He said, the principal Question for the Consideration of the Court would be; whether the Appeal to the Sessions was good. The Words of the Act, upon which the Conviction was founded, are, that the Fine shall be recovered in the same Manner, as any Part of the Revenue or Excise is by any of the Statutes now in Being appointed to be recovered. And therefore it must be inquired into, whether an Appeal lies in those Cases or not. Now as to that, he observed, that the Statute of 12 Car. 2. c. 23. was the first Statute, which mentions the Duty of Excise; it speaks only of Ale and other Liquors; and indeed this is the only Statute, properly relating to the Excise. There are, it is true, other Statutes, as 6 Geo. c. 21. which put a Duty upon Halt and Hides; and that Duty is under the Management of the Commissioners of Excise; but still the Duties of Excise are properly understood only of such Duties relating to Liquors, which are settled by that general Statute of 12 Car. 2. c. 23. that has been before-mentioned. That Statute gave those Duties to that King for his Life; and the Statute next following it settled them as a Revenue of the Crown for ever in the Room of those burdensome Tenures, which were the principal Part of the King's Revenue before. But no Appeal is given by the Stat. of 12 Car. 2. c. 23. or that of 12 Car. 2. c. 24. from a Conviction of two Justices. He did agree, that the Stat. of 6 Geo. c. 21. did give an Appeal; but that is confined only to those other Duties, that are under the Management of the Commissioners of Excise, and are no Part of the Duties of Excise itself. And so there is the same Distinction made between these two Sorts of Duties by the Stat. of 1 Geo. 2. Sess. 2. He then observed, that there was nothing done upon this Appeal the first Sessions, nor any Adjournment appears to have been entered for the farther considering the Matter on this Appeal; and therefore, he submitted it, whether this could be said to be a sufficient Appealing to the next Quarter-Sessions within the Meaning of the Act. He took Notice farther, that the Appeal is bad in Point of Form; for it is from a Conviction, Order or Warrant, which is not certain. Mr. Pilsworth on the other Side argued, and submitted it, that this Appeal was well maintainable even by the Stat. of 12 Car. 2.

c. 24. The 31st Sect. of that Statute expressly allows of Appeals to the Commissioners of Appeals from Convictions made by the Chief Commissioners and Governors of the Excise in London; it allows likewise of Appeals to the Quarter-Sessions from the Convictions of the Sub-Commissioners; and therefore that Clause must in all Reason be understood to allow of Appeals from Convictions of two Justices; since their Jurisdiction arises from this same Session. He observed farther, that it was well known, there were no Sub-Commissioners at this Day; he said too, he believed, there never were any appointed; and yet it is certain, there were Appeals to the Quarter-Sessions soon after the making this Statute; for the 15th of Car. 2. c. 11. sect. 19. provides a Remedy to prevent Abuses in them. So that if this is Fact, that there were no Sub-Commissioners ever appointed, the Appeals must have been from the Convictions of the two Justices. But if the Appeal in the present Case could not be maintained from this Statute, he submitted it, it well might within the Stat. of 6 Geo. that has been mentioned. The Meaning of the Word Excise has indeed been confined by the Attorney General to the Duties upon Ale and Beer, and such other Liquors, as are Part of our Home-Commodities; but he apprehended, that the Meaning of the Word was general, and extended to all such Home-Commodities whatever, upon which the Parliament has thought proper to lay a Duty; and is a Word of an opposite Signification to Customs, which are Duties laid upon Goods of a foreign Growth. If the Word Excise then was to be understood in this Sense; or if the Duties upon Salt and Hides were to be considered as Part of the King's Revenue or Excise, it follows, that an Appeal does lie in the present Case; for in Case of Convictions for not paying the Duties upon Salt and Hides, it is expressly given by the Statute of 6 Geo. c. 21. sect. 10. Then as to the Objection, for there being nothing done upon the Appeal at the first Sessions, he said, the Appeal was filed then; and so it appears by the Record, which is sent up; and that, he apprehended, was a sufficient bringing of it within the Meaning of the Act. And as to the Uncertainty of the Words in the Appeal, he submitted it, they were sufficiently certain; and that the Meaning of it shall be, that the Party appealed from the Conviction, and likewise the Order or Warrant made upon it. He then excepted to the Order of the two Justices, as being informal; for that the Act, upon which it was made, provides, that the Party shall be convicted only upon his own Confession, or the Oath of one or more credible Witnesses, and in the Conviction of the two Justices, it is not said in what Way he was convicted, only in general, that the Fact was fully and duly proved upon the Defendant. He said, for any Thing that appears, the Informer himself might have given the Justices what they thought full Proof; but that, he apprehended, was not sufficient. The Attorney General in his Reply, chiefly took Notice of the Objection, that had been made to the original Order; and said, he did agree, if it had appeared on the Face of the Conviction, that the Informer had been the Witness, it would have been bad; as the Informer himself is to have Part of the Penalty; and so he allowed it

it was determined in the Case of The Queen and Cobhall. But he submitted it, the Court had never gone so far, as to require it should appear upon the Face of the Conviction, that the Informer was not the Witness. He said likewise, that he did agree in drawing up these Convictions the Deposition of the Witnesses is generally drawn up at Length, and the Fact of the Information generally set forth to have been specially proved; but he apprehended it was never determined, but if it was only in general alledged, that the Truth of the Premises was made to appear, that would be sufficient. The Court declared that there was no Occasion to enter into the Merits of the principal Question, whether an Appeal would lie or not in this Case; for they said, they thought the Order of Sessions clearly bad upon an Exception taken to it by Judge Page, for its being only alledged, that the Defendant did give Notice to the Officer of the Number of Courses of his Candles, in Manner as the Statute directs, without alledging, that he gave Notice of the Number of Sticks, or of the Number of Candles, as the Statute requires, and as the Conviction charges the Defendant with omitting to do. Accordingly the Order upon the Appeal was quashed. As to the Exception to the original Order the Chief Justice and Judge Page inclined to be of Opinion, that the Order was good notwithstanding. The Chief Justice mentioned a very strong Case, which was that of The King and Symphon, which he was of Counsel in, when he was Attorney General in the Statute there, upon which the Defendant was convicted, required, that there should be the Confession of the Party, or the Oaths of Two or more credible Witnesses to convict him; the Defendant there was summoned to answer and did not attend; yet that was held to be a sufficient Confession within the Meaning of the Act. And as to its being requisite, that it should appear, that the Informer was not the Witness, they believed, that was never held. Judge Probyn and Judge Lee were of a different Opinion; and said, that they took it to be requisite, that so much should be set out in the Conviction, as to make it appear, that the Justices have given a right Judgment. For which Reason Judge Lee said he believed, it had been adjudged, that it must be set out, that the Witnesses were examined upon Oath; and that it will not be enough to say, that full Proof was made by Witnesses. Accordingly the Court conceiving this to be a Matter of considerable Doubt, they said, they would consider of it more fully before they gave their Opinions. *Vide post*

The King and Bently.

UPON a Return being made to a Habeas Corpus directed to the Defendant, Keeper of the Gaol of Norwich, the Attorney General moved, that the Prisoner might have Judgment passed against him on the Stat. of 6 Geo. 21, 34. But the Court observed upon the Return, that the Causes of the Commitment were not mentioned in it; and therefore thought it not sufficient. Upon which the Attorney General said, that there were no Words in the Habeas Corpus requiring this. The Court at first thought

The Certainty required in a Return to a Habeas Corpus.

thought this such a Fault in the Writ, as that they ought to quash it. But upon Mr. Masterman's saying, that the Form of all these Habeas Corpus's are so, the Court committed the Prisoner to the Marshalsea Prison, and ordered Precedents to be search'd.

Willing and Bourn.

How far a
Prisoner who
has escaped
cannot be
retaken.

ON Rule to shew Cause, why the Defendant should not be discharged out of Custody, Mr. Strange said, that the Fact was, that the Defendant had escaped by Breaking the King's Bench Prison, and before he was retaken had obtained a Discharge from the Plaintiff, which was shewn to the Marshal; the Marshal however had him retaken for his Fees upon a fresh Pursuit; and after that charged him in Custody with a Declaration in a special Action upon the Case for the Damage the Marshal suffered in the Walls of the Prison being broke. Upon this State of the Case, Mr. Strange submitted it, the Defendant was not intitled to be discharged; but if he was, the Court would leave him to his ordinary Remedy. The Court however declared their Opinions to be, that the Marshal had certainly no Authority to retake the Defendant for the Escape, after the Plaintiff had discharged him. They were likewise of Opinion, that the Marshal had no Authority to retake him for any Fees, that were due. Detain him, they said, for his Fees, the Marshal may certainly do, when he is legally in his Custody. But when he is once legally discharged out of his Custody, the Marshal is driven to his Remedy by Way of Action. Then as to the Action, that was brought by the Marshal for the Walls of his Prison being broke, they said, he could not hold him to bail without applying to a Judge. They observed farther, that as the Retaking was in itself unjustifiable all the Proceedings upon it must fall to the Ground; and therefore they said, they would discharge him even without finding common Bail. However the other Side consented to pay the Fees immediately; accordingly the Rule was drawn up by Consent, that upon the Defendant's paying the Fees, the Rule should be made absolute for discharging him out of Custody.

Harrison and Mitchel.

Vide ante
p. 8, 15

A Prohibition had been moved for de novo upon an Affidavit of Mr. Harrison and his Wife, that they had no Knowledge of their Brother's having been married; and a Rule obtained for shewing Cause, why it should not be granted. But the Court thought proper now to discharge it; for they said, it was doubtful to them, but Mr. Harrison and his Lady did know or had Reason to believe, that their Brother was married. And this Fact ought to be cleared up, not before the Court, but before the Ordinary. They did agree, if Mr. Harrison and his Lady had no Reason to have imagined, that their Brother was married, they were fully justified in making that Affidavit before the

the Ordinary, which they did; and, though the Fact had afterwards come out, that their Brother was married, this Court would not have suffered the Ordinary to have considered again about granting the Administration; but the Prohibition should certainly have stood. But where-ever this Court has the least Suspicion of the Party's believing, or having Reason to believe, that the Deceased was married, and notwithstanding this the Party makes such an Affidavit as in the present Case, the Ordinary shall have Liberty to inquire whether there was a Deceit put upon him or not. He shall be the Judge of that Fact. And if upon the Whole he is of Opinion, that there was a Deceit put upon him, he shall have it in his Power to grant the Administration de novo; but if he is of Opinion, that there was no Deceit put upon him, then indeed he shall not be suffered to grant it de novo. As to the Case of Sir George Sands, they said, it was more fully reported in Keble; but by no Means comes up to this Case; for here there was not so much as a Citation to allow the supposed Widow to come in. And they thought the Case in 1 Lev. 305. fully justifying the present Resolution. Accordingly the Rule for the Prohibition was discharged.

Coslet and Freeman.

MR. Kettleby moved for Costs for not going on to Trial; he did agree, that the Plaintiff had given a Countermand; but he submitted it, it was not in Time; for the Cause was set down for the Sittings in London, and the Defendant's Witnesses lived a considerable Distance in the Country; notwithstanding which the Plaintiff had countermanded the Notice but two Days before the Time for Trial. But the Court said, the standing Rule was, where the Cause is laid in London, and arises out of it, there must be four Days given for the Countermand; but where the Cause is laid in London, and arises in it, there need only be two Days. Accordingly this Case being, that the Cause of Action arose in London, where it was laid, the Countermand was held to be regular; and the Motion refused.

What shall be said to be a good Countermand of Notice of Trial.

The King and Morrice.

MR. Reeves argued now for the Defendant, and said, that the Counsel of the other Side had agreed, that where the Evidence varies in a material Part from the Declaration, the Plaintiff cannot recover. But he submitted it, the Cases had gone so far, as in some Instances to say, that the Plaintiff fails in his Proof, though the Variance be not material. To this Purpose he cited the Case of Courland and Hernigoe, Hill. 13 W. 3. That Action was Debt upon Bond for not performing an Award; the Defendant pleaded, no Award, the Plaintiff replied, that there was one, and set it forth in hæc verba. The Defendant in his Rejoinder demanded Oyer of the Award, and it appeared there were a few Clauses in it, but not material ones, omit-

Vide ante Vol. 1. 448.

ted in the Replication. Upon the Demurrer the Court were of Opinion, that when the Plaintiff took upon himself to set out the Award in hæc verba, he ought to have set it forth exactly as it was; and as he had not done that, the Court gave Judgment against him. So is 2 Lev. 85. to the same Purpose. But he insisted farther, that the Variance in this Case was in the most material Place. For the Person's Name is omitted in the Warrant, against whom the Judgment was; and certainly that ought to have been inserted to found a Warrant for executing that Judgment. And as to the Cases cited on the other Side, of the Name of a Grantor being omitted in the granting Part of the Deed, and the like; those were, where the Mistake was in one and the same Instrument; and there one Part of the Deed might by Construction explain the other. But nothing of this can be said in the present Case. He observed farther, that there was another Variance, in that the Declaration had set forth, that so much was recovered pro damnis, misis & custagiis, but in the Warrant produced at the Trial, the Recovery was said to be pro damnis only. He did agree, that this Objection had been spoke to before, and the Court then seemed to over-rule it, by saying, that Damnis was a Word, that included the Whole. But he submitted it, that the Court would consider of that Objection a little farther. The Court said, that they were of Opinion, that in all reasonable Understanding the Construction of the Warrant must be, that the Recovery was against Urket, and therefore they thought the Evidence agreed well with the Declaration. For the Warrant is not set forth in hæc verba, only the Substance of it. The Chief Justice said likewise, that the Fieri facias was proved in Evidence, which had in it the very Words of a Recovery against Urket; and when this Warrant was afterwards proved to be made out to the Bailiff in Pursuance of it; he thought it good beyond Question. The other Objection was not taken Notice of by the Court. Accordingly they ordered, that the Posse should be delivered to the Plaintiff, that he might enter up his Judgment.

The King and Bentley.

Vide ante 19.

THERE was now a new Habeas Corpus filed, and the Causes of the Commitment returned. Upon which the Attorney General said, that the Prisoner was convicted for beating a Custom-house Officer within the Description of the Statute of 6 Geo. 21. 34. and that Section in the Statute provides, that such Person shall be transported to his Majesty's Plantations for any Number of Years, not exceeding seven, at the Discretion of the Judges. And therefore he prayed the Judgment of the Court. Mr. Crowl on the other Side said, that Baron Carter tried the Prisoner for this Offence; and therefore he desired, that one of the Judges of this Court would be pleased to speak with him, and report from him the Nature of the Prisoner's Offence. The Court said, that that would be necessary; and therefore ordered it to be done. Upon which the Attorney General

neral prayed, that the Prisoner might in the mean Time be committed to Newgate; for that he had broke one Prison and escaped already. The Court said, the King's Bench Prison is a very weak one; and there are continual Complaints of its being broke, and Escapes made out of it. For which Reason they ordered him to Newgate.

Anonymus.

ON Rule to shew Cause, why a Writ of Error should not be quashed, Mr. Strange said, that the Exception which Mr. Theed had taken to it, was, that it was tested this Term and returnable the next, whereas there are fifteen Days within this Term from the Day of the Teste, wherein it might have been returnable. But he observed, that the Rule of the Court was, that in this Term and in Hill. Term, wherever a Writ of Error bears Teste after the first Return within Term, it may be returnable the Term after. And to this Purpose he had an Affidavit of the proper Officer. The Chief Justice said, that in the Case of Shirley and Wright it was determined, that this was good in a Capias ad Satisfaciendum; otherwise in mean Process. And the Court in general observed, that they thought it good in this Case. But if it was not, the proper Place to apply for Relief was the Court of Chancery, and not this Court. Vide ante

Hepworth and Pullen.

A Rule had been made a few Days ago, that it should be referred to the Master, to inquire whether one of the Persons, whose Name was put into the Bail-piece, was privy to his being Bail, or not. And now on Motion for the Master's Report, the Master stated the Fact specially; but upon the whole seemed inclined to think, that there was an Imposition put upon the Court, and that Somebody had personated this Man, whose Name is in the Bail-piece, without his knowing any Thing of the Matter. Upon which Mr. Cunningham moved, that his Name might be struck out of it. And cited Cotton's Case, 2 Cro. 256. The Court said, that before the Statute of 21 Jac. 26. these Motions were allowed. But since that Statute has made this Offence to be Felony, the Court has always refused them. To this Purpose the Chief Justice said, he remembered the Case of Dod and Stackburn, Trin. 11 W. 3. the Name of one Garbon was put in there as Bail; and in a Scire Facias against him, he laid this Fact before the Court, that he was personated in giving Bail without his having had any Knowledge of it; and yet the Court refused to relieve him. And to the same Purpose is 1 Ven. 301. Accordingly the Rule of Reference was discharged. How far the Court will not strike a Person's Name out of the Bail-piece.

Anony-

Anonymus.

Whom a Venire is proper to be directed to.

IN a Mandamus to swear in a Common Council-man for the Ward of Great Wyver in the City of Norwich, Serjeant Chapel had obtained a Rule a few Days ago to shew Cause, why the Venire should not be directed to the Sheriff of the County of Norfolk, upon an Affidavit, that the Sheriff of the City, and likewise the Coroners, and Freemen who would be of the Jury, in Case the Venire was directed to an Officer within the City, were all Parties interested in the Election. And to shew that Venires have been directed in such Case to the Sheriffs of the County at large, he cited Roll's Abridgment 597. The Case there is put, that an Issue is to try, whether there is such a Custom, as Foreign-bought and Foreign-sold in the City of York; and the Opinion there is, that the Venire in such Case shall be directed, not to the Sheriff of the City of York, but to the Sheriff of the County at large. And he observed besides, that though the present Election relates only to a Common Council-man for one of the Wards of the City; yet in Fact, a Common Council-man for one of the Wards is a Common Council-man for the whole City; and therefore in the Nature of the Thing every Freeman within the City must be interested in this Election. Mr. Strange came now to shew Cause against this Rule, and said, that he believed it was never thought of before, that a Venire should be directed to the Sheriff of another County, when the Election of a Common Council-man within a Ward was disputed. He observed, that Issues of this Sort are constantly tried in London; and therefore he submitted it, that for the Precedent sake the Rule ought to be discharged. And if there was any Reason to think, that there was any Partiality in the returning Officers, the other Side ought to apply, that Elisors should be appointed to strike the Jury. The Chief Justice said, that he well remembered a Dispute, that happened between the City of Norwich and the County of Norfolk, which of them ought to repair a Bridge; and the Venire was directed to the Sheriff of Suffolk. The Court said too, that they well agreed the Case cited out of Rolls; but they thought the present Case did not come up to it. Accordingly the Rule was discharged.

The King and Macajah.

How far several Persons may be joined in one Indictment.

THE Defendant having been convicted in an Indictment of Perjury without making any Defence, Mr. Fazakerly moved now in Arrest of Judgment, that there were five other Persons joined with this Defendant in the Indictment, whereas the Perjury of one Man is not the Perjury of another; and therefore there ought to have been several Indictments against them. He did agree, that in Offences of Trespass or Imbracery, or Crimes of that sort, the Indictments may be joint or several at the Election of the Prosecutors. But in other

other Offences the Rule is, that the Prosecutions shall be several. And therefore in the Case of The King and Wilson, Pasch. 11 Geo. 1. it was determined, that two Persons could not be joined in one Indictment for using a Trade against the Statute of 5 Eliz. So in Cro. Jac. 647. it is held a joint Action will not lie against two for Words spoke of another. The Court thought, there was some Weight in this Objection, upon which the Matter was ordered to stand over. Accordingly Mr. Fazakerly prayed, that the Defendant might be bail'd in the mean Time; for that he submitted it, the Court rather inclined to allow of the Exception that had been taken, and likewise because this was a Conviction without Defence. The Court said, that in Informations for Libels, though there be a strong Exception taken at the Trial, yet if the Party is in Court, they constantly commit him after Conviction. And in general they observed, that in Cases of this Sort, where the Court thinks proper to consider of an Exception, they constantly commit the Party in the mean Time; though where the Court is ready to allow of the Objection and give Judgment that way, if the Prosecutor desires Time to look into it, they did agree, they might bail the Party. And as to what was said, that there was no Defence made, the Chief Justice agreed that to be true; but observed, that there was a very strong Evidence given on the Part of the Prosecutor at the Trial. And therefore the Court remanded her.

The King and Empson.

MR. Reeves coming now to shew Cause, desired Mr. Agar Vide ante 2. to take all the Exceptions he had to these Orders, that he might answer them at the same Time. Upon which Mr. Agar took another Exception to one of them, for that the Commissioners stiled themselves in it Justices of the Peace as well as Commissioners; but in the ordering Part of it, which requires the Defendant to attend before them, it requires them only to attend before them as Commissioners of Sewers. And his last Exception was, that the Commitment is for not answering certain Questions relating to the Rasures of a Book, that was delivered to him as Foreman of a Jury. To the Exception then that was taken upon the former Motion, Mr. Reeves answered, that the Words quod cum, &c. are only Words of the Clerk that drew up the Order to be sent here, and are no Part of the Order itself but only an Introduction to it, and then the Order itself is said to be set out in his Anglicanis verbis sequentibus; and upon the Face of the Order so set out, the Facts in it appear all to be alledged with a positive Averment. He then observed as to the second Point, that the Contempt to the Court which the Defendant is committed for, is manifestly a Contempt to them, as Commissioners of Sewers, and therefore the Addition, which they have given themselves in the Stile of the Order is Surplusage. And as to the last Objection, the Question which was asked the Defendant, appears to be only, whether the Book was delivered to him

him in the same Condition as it was redelivered by him; and that is a Question, which he ought to have answered. The Court thought the two first Exceptions sufficiently taken off; but of the last they doubted. So this Matter was ordered to stand over.

Morrice and Redwyn.

When a Surety pays Money on Behalf of his Principal, how far he will be intitled to bring an Indebitatus Assumpsit against the Principal.

Norwich Assises. **A**. had recovered in the Court of Lynn against another, and when he was going to take out Execution, the Defendant there offered to give him a Note for the Money, and to get one to join in it as Security with him; which was done accordingly. After this the Plaintiff in the former Action commenced another Action against the Security, and recovered; upon which the Security paid the Money, and now brought his Action against the Principal for so much Money laid out to his Use. This Matter appearing at the Trial, the Defendant's Counsel excepted, that the Action would not lie. But Lord Raymond, who sat as Judge of Assise here, was of Opinion that it would. Accordingly the Plaintiff proceeded in his Evidence.

Norris and Le Neve.

How far Herald's Books shall be Evidence.

At the same Assises. **I**N an Ejectment, wherein a Descent came in Question, a Book out of the Herald's Office was produced to prove the Pedigree. Mr. Prime objected, that this was no Evidence, and cited Mr. Lloyd cited Salk. 281. in Proof that it was Evidence. The Chief Justice at first doubted; but as it appeared that this Pedigree was taken upon an Inquest made on a Visitation, he allowed it to be good Evidence; and it was accordingly read.

The King and Dr. Brown.

Construction upon the Statute of 21 Jac. 17. relating to Brokers.

At the same Assises. **T**HE Defendant was indicted upon the Statute of 21 Jac. 17. for receiving a Guinea and a Half on the Procuring of 100 l. But as he appeared upon the Indictment to be a Physician and not a Scrivener or Broker, Lord Raymond declared his Opinion to be, that he was out of the Meaning of the Act. And accordingly he was discharged.

Term. Mich.

5 Geo. II. 1731.

Martin and Davis.

IN an Ejectment for a Chapel and certain Lands in Hamstead, Mr. Filmer moved, that the Chaplain might be made a Defendant, quoad his Right of Entry into the Chapel to perform Divine Service; and quoted Salk. 256. in Point. But Judge Page said, in the Case of the Dean and Chapter of Westminster he remembered Dr. Broderick applied for such a Rule in the Court of Exchequer, and it was refused him. Lord Raymond said too, that he had known these Motions refused; accordingly it was so in the present Case.

What Persons may not be allowed to be added Defendants in an Ejectment.

Anonymus.

ON Rule to shew Cause, why an Information should not go for a Battery of a very enormous Nature, Mr. Parker said, that he had various Affidavits to produce, directly denying the Fact; and therefore he hoped, that by the Practice of this Court the Rule should be discharged. The Court agreed, that if the Battery sworn had been of such a Sort as Informations are generally granted for, the Practice of the Court was, that the Rule should be discharged; but as the Battery sworn is of a very enormous Nature, the Practice of the Court is otherwise; and accordingly the Rule was made absolute.

How far the Court will grant an Information for a Battery, notwithstanding the Facts are denied by the Affidavits on the other Side.

The

The King and Freeman.

What shall
be said to be
a good War-
rant of a
Judge of the
Court of
King's Bench.

THE Defendant had been indicted for a Battery, and upon that Judge Lee made out his Warrant to take him; which Warrant required, that the Defendant should be brought before one of the Judges, and if none of them were in Town, then before one of his Majesty's Justices of Peace, residing within five Miles of London. The Tipstaff however did not think proper to execute it; and for this Mr. Kettleby moved for an Attachment. Lord Raymond said, that Precedents might be shewn of these Warrants having been granted Time out of Mind. And it has been determined, that their Warrant is good even by Parol to arrest a Person committing an Offence openly before them. Accordingly the Attachment was granted.

Anonymus.

How far the
Court sets a-
side a Ver-
dict for a
Variance be-
tween the
Record of
Nisi prius
and the Copy
of the Issue,
when there
is no Defence
at the Trial.

Serjeant Darnel moved to set aside a Verdict, where there was no Defence, for a Variance between the Copy of the Issue and the Nisi prius Roll; the Copy of the Issue being made up with a Mistake in the Replication's concluding & prædictus Defendens similiter, instead of & prædictus Querens, and the Roll of Nisi prius being made up right. Lord Raymond said, that these Motions have been allowed; accordingly the Court made a Rule to shew Cause. A few Days after Serjeant Chapel made the like Motion for the same Variance in the Case of Robins and Churchman, where there was no Defence neither. And the same Rule was made.

Anonymus.

How far the
Court of
King's Bench
will grant an
Information
against a
Judge of an
inferior
Court.

Serjeant Hawkins moved for an Information against the Bailiff of Wallingford for an Abuse in his Office, as Judge of the Court within that Corporation. Lord Raymond said, an Attachment would lie for this Offence. And Judge Page observed, that it was granted in his Time against a Judge of an inferior Court for not giving Judgment. Accordingly the Court asked the Serjeant, which he desired, an Attachment or an Information. He answered, that he was instructed to pray an Information. The Court said, that this would end in an Attachment. Accordingly the Court made a Rule to shew Cause.

Bowes and Haddock.

MR. Kettleby came to shew Cause, why a *Pieri facias* should not be quashed, for its being taken out when a *Writ of Error* was depending. His Reason was, that the Defendant had got an *Injunction* continued in the Court of *Exchequer* upon these very Terms, that he should bring no *Writ of Error*, and has since actually given a Release of Errors. The Court said, that for the Breach of the Terms of this *Injunction* the Application ought to be made to the Court that granted it. And as to the other Part of the Reason, the Release ought to be pleaded in Bar to the *Writ of Error*, and they would not try it in this Way. Accordingly the Rule was made absolute.

How far the Court will set aside an Execution for being taken out pending a *Writ of Error*.

Anonymus.

MR. Fazakerly moved for an Information against the Bailiffs of Scarborough, for convicting a Man upon the Statute of 9 Anne 11. for selling Hides without being marked, and yet not allowing him to be heard, but at the same Time allowing the Informer to be the Witness. He said, before this Motion could be proper, he did agree, regularly speaking the Conviction ought to be brought up by *Certiorari*; but he remembered well that one of the Statutes in Geo. 1. had taken away *Certiorari* in these Cases. The Court accordingly made a Rule to shew Cause, and said, if a *Certiorari* would lie the other Side would then shew it.

How far an Information will lie for making an illegal Conviction.

Anonymus.

MR. Taylor moved for an Information against one Lisle, Deputy Town-Clerk of the City of Gloucester, for entering a *Verdict* different from what the Jury gave. One was indicted there before the Justices of Peace for an Assault and Ravishment. The Jury found him Guilty as to the Assault, but acquitted him as to the Ravishment. Notwithstanding which the Deputy Town-Clerk entered up the *Verdict* generally Guilty as to the Whole. Judge Page doubted, as this was an inferior Officer, whether the Party ought not first of all to have applied to the superior Officer for Redress. But Judge Lee said, he took it in the Case of the Town-Clerk of Norwich, the Court granted an Attachment against him directly; and that was for entering up a Record of Sessions wrong; which is much such a Case as this. Accordingly the Court made a Rule to shew Cause. And afterwards made it absolute.

How far an Information will lie against an Officer for entering up a *Verdict* wrong.

Holt and Forest.

When a Recognizance of Bail is entered into in Pursuance of the Statute of 16 & 17 Car. 2. what shall be a Breach of such Recognizance.

IN Debt upon a Recognizance against Bail, given on a Writ of Error in a Judgment after a Verdict, the Plaintiff had set forth the Recognizance in the Declaration, and on Oyer the Condition appeared to be, that if the Plaintiff in Error should prosecute his Writ of Error with Effect, and if the Judgment should be affirmed, and if he should pay such Money as should be awarded, then the Recognizance should be void. To this the Defendant pleads, that the Plaintiff in Error did prosecute his Writ with Effect, and that the Judgment was not affirmed. The Plaintiff replies, that the Plaintiff in Error suffered himself to be nonpross'd. And thereupon the Defendant demurs generally. Mr. Strange now argued for the Defendant, and said that this Recognizance was given upon the Statute of 16 & 17 Car. 2. 8. (3). but it by no Means followed the Words nor Meaning of it. For the Words in that Section are, That if the Judgment shall be affirmed in the said Writ of Error, or that the said Writ of Error be discontinued in Default of the Plaintiff or Plaintiffs therein, or that the said Plaintiff or Plaintiffs be nonsuit in such Writs of Error; and they are all in the Dissjunctive. But the Words of the Condition in this Recognizance are an intire different Set of Words, and all in the Copulative. For which Reason he submitted it the Plaintiff could not recover. Mr. Parker on the other Side argued, and said, that the Objection, now taken to the Form of this Recognizance, was by no Means a new Objection; for, when he was Clerk of the Errors, he remembered it was taken, and strongly insisted upon. Lord Maclesfield too was spoke to about it; Precedents were searched; and it was found, that for above fifty Years then past, every one of these Recognizances was in this Form. Lord Raymond said, that however the Penning of the Condition in this Recognizance be, the plain Meaning of it must be, that the Plaintiff in Error should prosecute his Writ with Effect, and if the Judgment be affirmed, that he should pay the Money. And whenever a Word is put in of a direct contrary Signification to what the Party intends, the Court will transpose or change that Word, in order that the Party's Intent may take Effect. And that is like the Case which has been determined, where the Condition of a Bond was, that the Party should not pay the Money; the Court understood the Condition, as if the Word not had been left out. And he took that Case to be much stronger than the present one. However, he said, if this Recognizance had not been given according to the Act, but the Party had voluntarily entered into one with a different Condition, such Recognizance would bind him; and so this Point has been expressly determined. It being then to be taken for granted now, that the Recognizance is a good one, and within the Meaning of the Act; he said, it might be proper to consider, what Construction should be put upon the Words prosecuting with Effect. And as to that, he did not think indeed they required the Party to reverse the Judgment; but only to bring the

the Judgment so before the Court, as to have it reversed or affirmed. However in the present Case the Plaintiff in Error has done neither of these Things; and therefore, he thought the Recognizance clearly forfeited, by his suffering himself to be nonprossed. Accordingly the Court ordered, that the Plaintiff should have his Judgment, unless Cause on Thursday next.

Anonymus.

ON Rule to shew Cause, why an Information should not be granted against the Defendant for setting Nets cross one of the publick Rivers. Mr. Reeves said, that he did not certainly know what Statute the former Motion was made upon; but he supposed it was that of 1 Geo. 18. (14). And if it was, he apprehended an Information would not lie; because that Statute has prescribed a summary Method of proceeding before Justices of the Peace. Upon which Mr. Wilbroham said, that he founded his former Motion on the Statute of 2 H. 6. 15. But Mr. Reeves said, that then there was a very plain Answer to be given to it, which was, that the Statute of 21 Jac. 4. has provided, that all Informations brought upon Penal Statutes made before that Time, should be laid in the proper County, where the Fact arises. And it was determined therefore in the Case of The King and Gall, that no Information for such Offence could be granted by this Court. Accordingly the Court discharged the Rule.

When a Statute creates an Offence, and prescribes a particular Method in order to punish it, how far the Court of King's Bench cannot grant an Information.

Lane and Chapman.

MR. Strange moved to set aside a second Fieri facias, that had been executed after the first, and no Notice taken in it of any Money being levied upon the first. And besides he said, the Defendant had Goods enough by him, to have had the whole Debt and Costs levied upon the first. Accordingly the Court made a Rule to shew Cause.

How far the Court will set aside a second Fieri facias. Vide post.

Anonymus.

ON Rule to shew Cause, why a Prisoner should not be discharged out of Custody upon the late Statute of 2 Geo. 2. for the 2 s. and 4 d. not having been duly paid upon the Day, Mr. Marsh said, that Thursday was the Day on which it ought to have been paid, and the Plaintiff gave the Money to his Servant to be delivered to the Defendant on that Day, but the Servant forgot it, and did not go to deliver it till seven the next Morning, and then did tender it the Prisoner, but he refused to accept it. He observed, that the Court in other Instances has not kept to the Letter of this Act of Parliament, for the Act requires, that the Money shall be paid on the first Day of the Week; but the Court has construed that Day to be the first Day after the Plaintiff's Undertaking. And there.

How far the Court will discharge a Person out of Custody on the Statute of 2 Geo. 2. by Reason that the Weekly Payment which that Statute prescribes was not duly made him.

therefore he hoped, there should be a like Construction made upon this Clause, by understanding it to mean The first Day of every Week after his Undertaking, or as soon after as in any Convenience may be. The Court said, they were intirely for keeping to the Letter of the Act in this respect; for otherwise they did not know where they should stop. And Judge Lee said, the Court has been of the same Opinion upon the Statute of 3 & 4 W. 11. relating to Settlements; and there they will not allow of the least Variation from an intire Year's Service. Accordingly the Rule was made absolute.

Seymour and Winnyat.

When a Writ of Error is brought in the House of Lords, what is the Nature of the Recognizance, which is entered into upon that Occasion.

When a Writ of Error is brought in the House of Lords, what Time the Court of King's Bench will give the Party to justify his Bail in.

UPON a Writ of Error in Parliament on a Judgment of the Common Pleas affirmed in this Court, M^r. Reeves moved for a Week's Time to justify their Bail, and that Execution might be staid in the mean Time. He said, the Reason for his Motion was, that the Bail were out of Town, and could not be back again till then. But if the other Side should be unwilling that such Rule should be made, he would consent that M^r. Molesworth, one of the Bail upon the former Writ of Error, and a Member of Parliament, should be Bail in this. Judge Page said, that he had known it an Objection in the Common Pleas and Exchequer to a Person's being Bail, that he was a Member of Parliament. And the other Side declared, that they would not consent to M^r. Molesworth's being Bail here; and hoped, that no Time should be given to justify in this Case. But the Court declared, that Members of Parliament were frequently Bail in the Crown-Side of this Court; and they would not suffer that to be any Objection of the other. They said farther, that it has been held, that no Bail was requisite upon a second Writ of Error. Indeed they did agree, that the Law was at this Day held otherwise. However they observed, that the Condition of the Recognizance of Bail in this Case only subjected them to pay the Costs upon the Affirmance of the Writ of Error, which the Chief Justice said could not be above 100 l. And therefore they granted the Motion.

Parrot and Green.

How far the Court stays Proceedings upon a Distringas nuper Vic'.

ON Rule to shew Cause, why Proceedings should not be staid upon a Distringas nuper Vic' for that Bail had been put in at a Judge's Chamber, and no Exceptions entered in the Book, the Counsel said, that the Plaintiff's Attorney met the Defendant's Attorney, and told him, he did expect he should justify in Court. And that the Court held to be sufficient. However Judge Page said, if the Plaintiff should insist upon going on upon the Distringas, they will compound this Matter in the Exchequer. For which Reason the Court advised the Parties to agree it, which they accordingly did.

Spinmore and Bowler.

ON Rule to shew Cause, why the Defendant should not be discharged out of Custody, upon his having signed a Nonpross for want of the Plaintiff's declaring against him within two Terms, Mr. Strange said, that the Fact was, that the Defendant was sued in one of the City Courts, and removed himself here by Habeas Corpus; after that he made an Escape, and being taken up by an Escape-Warrant, was committed to Newgate; upon this he lay in Newgate for above two Terms, and the Plaintiff did not declare against him. Upon the State of this Case Mr. Strange said, he should submit it, that the Nonpross was irregularly signed. He did agree, that if the Action had not been brought in the City Court, but had been brought here, the Nonpross would have been regular, and according to the Intent of the Statute of 4 & 5 W. & M. 21. and 1 A. 6. But he submitted it, that the Statute of 1 A. 6. (1). has only provided, that Proceedings shall go on against the Party taken upon an Escape-Warrant, where an Action was actually pending against him at the Time of the Escape. And in the present Case no Action was depending. For the Action in the City Court was determined by the Habeas Corpus; and no Action was begun in this Court. The Court thought this a Matter deserving Consideration; so the whole of it was refer'd to the Master; that the Irregularity of the Nonpross might be inquired into. Vide post.

Burgis and Page.

MR. Strange moved for a Rule on the Under-Sheriff of the County of Northampton, to shew Cause why he did not deliver to the Plaintiff the Money levied on a Fieri facias, upon an Affidavit, that the Defendant's Goods being taken in Execution, the Under-Sheriff wrote a Letter to the Bailiff to deliver them up, because he had received the Debt and Costs; since which the Money had often been demanded of the Under-Sheriff, but he had not paid it. The Court declared they should willingly grant the Motion, if it had ever been granted before; for they have observed of late, that Under-Sheriffs make it a Practice to delay Plaintiffs their Suits, and to stand out, till the Attachment. However they said, they would think of some Way to make Under-Sheriffs pay Costs for their Delay. The Rule made at present, was only, that the Sheriff should return his Writ.

What kind of Rules are proper to be made on an Under-Sheriff.

Anonymus.

How far Bail
above shall
be said to be
Regular.

MR. Agar moved to stay Proceedings against Bail. In Hilary Vacation the Plaintiff sued out the Writ, which was returnable the first Wednesday in Easter Term, and on the Monday following took an Assignment of the Bail-Bond, on which same Day Bail was put in. Mr. Strange submitted it, that the four Days for putting in Bail must be reckoned inclusively, so that the last Day for putting in Bail was on the Saturday. But the Court were of Opinion, that one of the Days must be exclusive; and that therefore the Bail above was regular. Accordingly granted the Motion.

— and Smith.

How far the
Court can-
not proceed
in a summary
Method a-
gainst an At-
torney.

Serjeant Uelin moved, that the Defendant's Attorney might shew Cause, why he did not deliver up 100*l.* which was delivered him as an Indemnity against all Damage that he might suffer by becoming Bail. The Plaintiff had given the Defendant a general Release, and yet the Attorney refused to deliver up the Money. The Court said, they did not see how a Rule could be made upon him to do this; because in this Respect he did not act as an Attorney. However a Rule was made upon him to shew Cause why he should not consent.

Anonymus.

How far the
Court will
not grant an
Information
against a Per-
son for ma-
king an ille-
gal Convic-
tion, till the
Conviction is

MR. Strange moved for an Information against one Heber, a Justice of Peace, for convicting a Man for killing five Hares, and refusing to hear what he could say in his Defence. But the Court refused the Motion, because the Conviction was not brought up by Certiorari. They said, if there was no Conviction, there ought to be no Information; and if there was a Conviction, this ought to appear by the Record.

brought into Court by a Certiorari.

Blake and Hutchenfon.

How far the
Court will
set aside a
Judgment,
notwith-
standing the
Length of
Time.

IN Debt on a Judgment of sixteen Years standing, Mr. Prime moved to set the Judgment aside, for its being entred up of a Term precedent to that whereof the Writ was taken out, whereon the Defendant was arrested. The Latitat bore Teste, Hil. 1715. and the Judgment was entred up on the Mich. Term before. Accordingly the Court ordered this Matter to be referred to the Master, and upon an Affidavit of Notice of the Motion Proceedings were said in the mean Time.

Anonymus.

MR. Kettleby moved for an Attachment against one Wright, the Keeper of a Mad-house, for not making a Return to a Habeas Corpus. But M^r. Masterman informed the Court, that he took the Practice to be, to obtain a Rule for his returning the Writ. Upon which M^r. Kettleby said, that he believed, in the Case of Colonel Dunbar, an Attachment was granted directly for his not making a Return to a Habeas Corpus, where he was going to ship off some People directly without Authority. Judge Page said too, in the Case of D^r. Fellers he believed the same was done, where a Habeas Corpus was directed to him to bring up a Person, who was ordered by him to be put under a Pump of cold Water to cure him of a pretended Madness. And Judge Lee took it, the Case of M^r. Baldwin of Ludlow was in Point. The Chief Justice said likewise, that he believed the Distinction was between these Habeas Corpus's directed to private Persons, and those to publick Officers. Accordingly the Court were granting the Attachment; and then the Return was put in.

How far the Court will grant an Attachment against a Person for not making a Return to a Habeas Corpus, without first of all making a Rule to return the Writ.

Probin and Churchman.

MR. Draper came now to shew Cause, and said he submitted it, that this Defect (if any) was amendable within the Statute of 8 H. 6. and therefore the Rule ought to be discharged. But yet he took it, that there was no Occasion for an actual Amendment. And it might be doubted, whether this was any Defect at all. The Defendant's Plea, he said, concludes, & hoc pet' quod inquiratur per Patriam; & prædictus Defendens similiter, instead of & prædictus Querens. But he submitted it, that the Word pet' might be read petunt; and then there is a complete Issue, and the rest Surplusage. To this Purpose he cited a Case determined very lately in the Common Pleas. That was an Action wherein were three Counts, two upon Bond, the third upon a Mutuatus. To all the Counts the Defendant pleads the General Issue. But to the two first, his Plea concluded with a hoc petit, &c. and no prædictus Quer' similiter. To the last he concluded with a hoc petit and a similiter. Upon this, he said, an Objection was taken, that there was no Issue joined upon the two first Counts; but the Court there held, that the last cured it; and they construed that Issue to extend to the whole. He said, Serjeant Chapple was Counsel in that Motion, and he appealed to him, whether the Fact was not so. Serjeant Chapple on the other Side argued, and said, he believed, he must give it up, that this Fault was amendable. But he begged Leave to insist, it was a Fault; and as a Fault it ought to be amended. To shew, that this Fault ought to be amended, he said, he thought he need mention no other Authority than 1 Cro. 633. And if this was so, the other Side were not capable to make this Amendment; for the

Vide ante 28.

the Roll above is wrong, as well as the Nisi prius one; and then there is nothing to amend by. The Court in general agreed, that this was a Fault; but they thought it as certain, that it was a Fault amendable. And this upon the Authority of two Cases, one cited by Judge Page of Greenwood and Pickings, Mich. 7 W. 3. the other cited by Judge Lee of Rawborn and Hickman, Pasch 9 Geo. 1. which Cases were both in Point. But the Question, which the Court conceived great Doubts upon, was, whether there was Occasion for the Record of Nisi prius being actually amended. The Chief Justice declared his Thoughts to be, that an actual Amendment might be insisted upon. For, he said, the Motion that a Clerical may be set aside is in Effect a Motion to stay the Judgment; and so long as there is a Defect appearing upon these Records he did not think they could give Judgment. But Judge Page and Judge Lee declared, that in the two Cases by them cited there was no Amendment made; the Court only said there that the Fault was amendable; and upon that nothing more was expected. And Judge Page declared farther, that in the Case by him cited the Fault went through the whole, there was nothing to amend by; but yet the Court declared there it was *Vitium Clerici*, and the whole amendable. Accordingly upon the Authority of these two Cases the Chief Justice came over in his Opinion to the two other Judges; and Judgment was given for the Plaintiff without any Amendment.

Anonymus.

How far an Arrest may be made upon a Bill of Middlesex within the Liberties of London.

MR. Parker moved that Proceedings might be said, upon an Affidavit that the Arrest was made within the Liberties of London upon a Bill of Middlesex. But the Court said, that that Affidavit was not sufficient, for the Liberty of London may extend into Middlesex, though no Part of London itself does. And Judge Page said, the Borough of Southwark is within the Liberty of London, though it lies in the County of Surry. The same, he said, has been thought of the Temple, that it lies within the Liberty of London, though out of the City and County. Accordingly the Motion was not allowed.

Lane and Chapman.

Vide ante

MR. Strange having obtained a Rule to shew Cause, why a second *Fieri facias* should not be set aside for its not being marked, but generally made out for the whole Judgment, though Part of the Money was actually levied upon a former one; Mr. Fazakerly now moved to discharge it. He said, he did agree, the want of marking the Writ was a Fault, for which there must be some Method of being relieved. But he submitted it, that the Method to have been taken was, an Action upon the Statute, which relates to this Matter; and not a Motion to set the Execution aside for this Reason. For those Motions are not allowed, but where there is an Irregularity in the

the Issuing out of the Process, which cannot be pretended in this Case. And he declared, In all his Experience he never knew such a Motion made. But the Court, in the absence of the Chief Justice declared, that they thought this a proper Method to apply for Relief; and they believed it had oftentimes been made Use of. However the Matter at last went off upon an amicable Proposal.

Burden and Tomling.

IN an Action upon the Case the Plaintiff declared upon a Promissory Note given by the Defendant, and bearing Date the 22d Day of Feb. 1728, by which Note the Defendant agreed to pay the Plaintiff several Sums at several Instalments, the last of which was not to be till some Time in the Year 1732; and then the Declaration set forth, that the Defendant so being indebted *eisdem die & anno* promised to pay; but that he did not pay the same; whereupon the Plaintiff brought his Action for the Money due on some of the first Instalments. To this the Defendant pleads, that he became a Bankrupt on the 11th of March 1728, (which was before the Money due upon the first Instalment) and that the Cause of Action accrued before such Time as he became a Bankrupt; and concludes his Plea with *a hoc paratus est verificare*. The Plaintiff in his Replication demurs to this Plea; and shews for Cause, that the Plea ought to have concluded to the Country, and not with an Averment. Mr. Bootle, Jun. now argued for the Plaintiff, and submitted in the first Place, that the Substance of the Plea was bad, because the Act of Bankruptcy was before the first Instalment; and in the next Place, that the Conclusion of the Plea was bad; and to this Purpose cited the Case of Britton and Lassel, Mich. 2 Geo. 2. in the Court of Exchequer. That was an Action upon several Promises; as to all the Money demanded by the Declaration but 10*l.* the Defendant pleaded his becoming a Bankrupt, and concluded his Plea in the same Manner as this is, with *a hoc paratus est verificare*; and as to the 10*l.* Part of the said Promises, he pleaded Non Assumpsit. The Plaintiff demurred to this Plea, and shewed two Things for Cause; one that the Plea ought to have concluded to the Country; the other, that it was uncertain which of the Promises the 10*l.* excepted related to. The whole Court, he said, delivered their Opinions, that the Plea was bad upon the first Exception; and the late Chief Baron said, that he had known the same Point twice before determined so upon his Argument. Mr. Jossling on the other Side argued, and submitted in the first Place, that the Action ought not to have been brought till the last Day of Payment was over, and for this Purpose relied upon Co. Lit. 47. He submitted it likewise, that the Declaration was bad in Substance, because the Promise to pay is laid to be at the Time of the last Instalment. For the Words *Eisdem die & anno* must refer to that Time; it being a known Rule, that the Words *idem* semper refertur proximo Antecedenti. Then in Answer to what had been objected against the Defen-

How far a Plea ought to conclude to the Country, how far with an Averment.

dant's Plea, he submitted it, that it was right both in Form and Substance. And the Determination of both these Questions must depend upon the Construction that shall be made on the Statute of 5 Geo. 24. (14, 30.) the last Clause relates to the Substance of the Plea; and therefore he chose to observe upon that first. As to that, he said, the Words of the Clause were, That the Certificate of a Bankrupt shall be a full Discharge of any Debt or Demand contracted, due or demandable before the Issuing out of the Commission. And he did submit it, that a Note of Hand, payable at a future Day was in itself a Demand contracted before the Day of Payment within the Meaning of the Act. Then as to the Form of the Plea, he said, he apprehended, that the Plea would have been bad, if it had concluded to the Country. The Plea of the Bankruptcy is a new Fact; not denying any Thing that the Plaintiff has alledged in his Declaration, but confessing and avoiding it. But before the Party is intitled to join Issue, there must be both a Negative and an Affirmative. And besides he observed, that there were Facts, which the Plaintiff might possibly alledge in Avoidance of the Defendant's Plea, which the Defendant by concluding to the Country would have prevented him from doing. The Chief Justice declared his Opinion to be, that the Action was well brought; and said, that in these Contracts he took it the Distinction was, between Actions of Debt brought upon them, where the Thing itself is to be recovered, and these, where Damages only are to be recovered; for here the Jury may sever the Damages, as they think proper. He said likewise, that he took it, the Substance of the Plea was not good, and that the Promissory Note in Question was not a Demand contracted till the Day of Payment, within the Meaning of the Act. Mr. Bootle too in his Reply said, that the *eisdem die & anno, &c.* was meer Surplusage; and therefore, he apprehended, whatever Construction was made of it, it could signify nothing. However the Court did not deliver their Opinions solemnly upon any other Point, but that relating to the Form of the Plea. And as to that Matter the Court declared their Opinions to be, that the Intention of the Legislature was, that the Plaintiff should not be able to reply any new Matter; but that the whole Merits of the Action should be tried upon that single Issue. For which Reason they declared their Judgment to be, that the Plea ought to have concluded to the Country. And so Judge Lee said, this Point was determined in the Case of Miles and Williams in this Court, when Lord Mackelfield sat as Chief Justice; there Debt was brought upon Bond against two; the Defendants jointly pleaded, that the Plaintiff ought not to have his Action, because one of the Defendants became a Bankrupt after the Bond became due; and in the Plea set out more than it needed have done, and then says & sic he became a Bankrupt; & hoc parati sunt verificare. To this Plea the Plaintiff specially demurred for this very Reason for which the Plaintiff now does. And upon great Debate the Conclusion of the Plea was held bad. Accordingly in the present Case the Court gave Judgment for the Plaintiff. The next Day Mr. Josling came into Court and said, that he had been informed, that a Case of the

the same Nature with the present one had lately been in the Common Pleas; the Name of it was Fuller and Burden, and it was determined about three Terms ago. There a Plea of Bankruptcy concluded to the Country; and in Serjeant Hawkins's Argument to support it, the whole Court seemed clearly inclinable against it. Upon its coming on again before that Court, the Case of Miles and Williams, which has been mentioned, was cited. He did agree, three of the Judges altered their former Opinions, and held the Plea to be good; but the Chief Justice continued of the Opinion he was of at first. For which Reason he hoped, the Judges of this Court would be pleased to confer with the Court of Common Pleas; and that, as the Judgment was in the Breast of this Court for the whole Term, they would be pleased to stay Execution, till they had conferred with them. But the Court said, that since they declared their Resolution Yesterday, they had considered of this Matter again amongst themselves, and had found stronger Reason to abide by their Opinion. For upon Judge Lee's looking into the Case of Miles and Williams he had found, that in Lord Macklesfield's Argument he had cited another Case determined upon the same Point; and that was the Case of Bugg and Lacey 6 Ann. The Chief Justice farther said, that upon looking into the old Books he believed it would be found, that an Affirmative and Negative is not always requisite to the forming an Issue, and instanced the Case of *partes finis nihil habuerunt*. Accordingly the Court declared, that they would abide by the Resolution they had given; and let the Party take his Remedy by a Writ of Error. Vide post.

Salford and Storeford.

MR. Reeves moved to quash an Order of two Justices confirmed at the Sessions. The Sessions specially stated the Fact to be, that one Lineacre had been bound an Apprentice by Indenture, and served his Master the last two Years of his Apprenticeship in the Parish of Salford in the County Palatine of Lancaster; but that his Indenture was not stamped. However the Justices adjudged this to be a good Settlement by way of a Service, though not as an Apprenticeship; accordingly removed his Wife and two Daughters from the Parish of Storeford in Cheshire to this Parish of Salford. But he submitted it, this was directly contrary to the Resolution lately made by the Court in the Case of Courden and Leeland. And accordingly the Court made a Rule to shew Cause. And this Term made it absolute.

How far a Person shall not gain a Settlement by serving an Apprenticeship.

Lofield

Lofield and Bankcroft.

How far an
Innuendo is
necessary to
be laid in an
Action for a
Libel.

Vide post.

IN an Action for a Libel published in the Post-Boy, July 30, 1730, the Declaration set forth the Advertisement to the following Effect. A Warrant of Felony having been issued out against John Lofield of such a Parish, this is to give Notice, that whoever shall apprehend him, shall receive a Reward of 10l. by me, Bankcroft. And now Mr. Filmer moved in Arrest of Judgment, and submitted it, as the Declaration was laid, the Plaintiff could not recover. He said, it was not laid, that the Words were spoken any Ways relating to the Plaintiff; nor one Innuendo, to shew, that they any ways concerned him. And that this was necessary, he cited 2 Cro. 126. It was farther insisted, that the Declaration could not be maintained; because it is no where laid in it, that the Plaintiff had not such Warrant issued out against him. It was likewise said, that the Words variation' e poculo were bad, notwithstanding the Anglice picking a Pocket; and for this Purpose was cited 2 Keb. 19. It was urged farther, that the Action was against three jointly, whereas the Actions ought to have been several. The Chief Justice said, he thought the Exception for want of an Innuendo had a good deal of Weight with it. Accordingly this Matter was ordered to stand over.

Astley and Reynolds.

When a
Pawn Broker
receives
more Interest
than he is
intitled to,
how far an
Indebitatus
Assumpsit
will lie in
order to re-
cover it back
again.

THE Trial of this Cause having come on before the Chief Justice at Nisi prius, a Case was drawn up specially for the Opinion of the Court. The Case was, that upon the 29th of October 1726, the Defendant lent the Plaintiff 20l. upon the Pledge of a Piece of Plate, and no Agreement was made about Interest. Afterwards on the 8th of October 1729, the Plaintiff went to redeem his Plate, and asked the Defendant, what was due to him for Interest. The Defendant insisted upon 10l. The Plaintiff refused to give it him, but tendered him the Principal with 4l. for Interest. Upon the Defendant's not agreeing to it he went away; but on the 6th of February following came again and tendered the Principal and 4l. for Interest as before. The Defendant insisted then likewise upon Ten Pounds for Interest; and upon that the Plaintiff paid it him, knowing the same to be more than legal Interest. And now brings his Action of Indebitatus Assumpsit for so much Money had and received to his Use for what was beyond the legal Interest. Upon the Trial the Plaintiff obtained a Verdict, subject to the Opinion of the Court upon the Case, which has been stated. Mr. Reeves was Counsel for the Plaintiff, and submitted it for a Principle known and certain, that if a Man pays Money in his own Wrong by Mistake, an Indebitatus Assumpsit will lie for that Money. He apprehended likewise the Law to be clear, that if a Man pays Money to another freely to do a wicked Act, an Act, which is malum in se, all

an Indebitatus Assumpsit will lie for that Money; and to this Purpose was cited the Case of Wilkenfon and Kitchen, Trin. 8 W. 3. There Money was given to a Solicitor to lay out in Bribes; the Solicitor did lay it out so; and an Action was, notwithstanding, brought against him for so much Money had and received to the Party's Use. There was a considerable Debate whether that Action would lie; and held to be maintainable. But he did not conceive this Action to be so difficult to maintain as that. For there the Party paid his Money voluntarily; but here he was forced to do it; for he could not get his Goods without it. And in 1 Rolls Abr. 687, it is held, that Duress upon a Man's Goods shall as much avoid even his Deed, as Duress upon his Person. Mr. Fazakerly on the other Side argued and said, he did agree, that where-ever a Man pays Money by a Mistake an Indebitatus Assumpsit will lie. But he did submit it, the Rule of Law was, that where-ever a Man pays Money, knowing what he does, he shall never recover it back again. *Volenti non fit Injuria* is a Principle of Law as well as Common Reason. And for this Purpose he cited Salk. 22. Skin. 412. 6 Mod. 161. He said, he did think it to be a very hard Thing to maintain, that here was Coercion in this Case. The Defendant indeed insisted upon the Money; but the Plaintiff took a long Time to consider of it; and afterwards paid it. He observed too, that it might be doubted, whether the Plaintiff had any Right to the Plate upon the Tender that he made. The Tender of 4*l*. was a Tender of more than legal Interest; which the Defendant was not obliged to accept; and if he had accepted it, he might have been punished for it. The Tender therefore he submitted it, was void; and if so, the Plaintiff could not have recovered his Goods even in an Action of Trover. He said farther, that he conceived the Position maintained by the other Side of a Man's recovering back Money which he had paid upon an illegal Consideration, not to be Law. He said, if a Man gives Money to beat another, he believed, it was never heard of that an Indebitatus Assumpsit would lie; and it has been even determined, that it will not for Interest paid that is Usurious. The Giver and Receiver are both involved in the Guilt, and therefore the Giver shall not have any Assistance from the Law to recover the Money out of the Hands of the Receiver. And he said, it has always been taken for known Law, that these Actions will not lie even for Money stolen. The Court declared their Opinions very freely, that the Tender was well made. They thought the Tender of more than is due, must be a Tender of that which is due; though they did agree, a Tender of less would not. And Judge Page said, that he believed it had been determined, that if a Man throws a Bag of Money loose upon a Table, and bids the other take what is his due, that is a good Tender. But the great Difficulty which stuck with the Court, was, Whether, as this Case was, the Action of Indebitatus Assumpsit would lie. The Chief Justice said, if the Case cited out of Rolls was Law, it was a pretty strong Authority to maintain the Action. He owned, he had some Doubts of it; however inclined to be of Opinion that it would lie singly upon this

What shall
be said to be
a good Tender.

Consideration, that there was something of a Force put upon the Plaintiff. Judge Page said, he took it, there was something of Deceit as well as a Force; and if the Party paid the Money any way upon a Surprise, he took it clearly the Action would lie. For then it would fall within the Common Case, where an Attorney delivers a Bill, and the Client pays it; yet if the Client was overcharged, he shall recover the Overplus Money in an Indebitatus Assumpsit, though he did not apply to have the Bill taxed. And he believed, he remembered the first Action of that Sort that was maintained. Judge Probyn said likewise, that he thought there was something of a Deceit as well as a Force in this Case; for the Plaintiff borrowed the principal Sum upon the Credit that he was to pay only common Interest; afterwards the Defendant would be for drawing him to pay a greater Interest. Judge Lee however declared his Opinion to be, that here was neither a Deceit put upon the Party, nor a Force. He said, he took it, that the Plaintiff plainly knew what he did, he had full Time to consider of it; and therefore he thought this Case fell within the common Rule of Volenti non fit Injuria. The Court thought this a Matter of considerable Consequence as well as Difficulty; for they said if this Action could be maintained, it would be a much more easy Remedy, than to bring an Action of Trover for the Goods. And therefore thought it deserved to be farther considered of. So it was ordered to stand over for the Opinion of the Court. But the last Day of the Term they gave Judgment for the Plaintiff, with Liberty to enter it up nunc pro tunc.

Dilly and Polhill.

Vide Vol. 2.
448.

THIS Matter now coming on again, Mr. Strange took the following Exception; he said that this was Debt upon an Award, and the Declaration had only set forth, that the Arbitrator was indifferenter elect' & nominat' tam ex parte Querentis quam ex parte Defendentis; and not said that the Arbitrators were chose by the Parties, Plaintiff and Defendant. Upon which Mr. Strange excepted now to the Declaration for that Reason. He said, in 2 Saund. 61. in 2 Roll. Rep. 194. and in many other Precedents this is expressly laid, that the Arbitrators were chosen by the Parties. And he did apprehend, that there was a manifest Distinction between the Case of a Bond to perform an Award and the present Case. For there the Duty arises upon the Bond, but here it must be expressly laid, that the Parties themselves did mutually submit to the Award of the Arbitrator, in order to raise a Consideration. Serjeant Hawkins was on the other Side, but was not prepared to cite any other Cases, but those of Debt upon Bonds to perform Awards; and therefore the Court ordered this Matter to stand over. Vide post.

Miles and Wollham.

IN Writ of Error brought upon a Judgment recovered by a Bankrupt, the Administrator to the Bankrupt sued out a Scire facias against the Plaintiff in Error, to make him assign his Errors. To this Scire facias the Plaintiff in Error pleaded, that the Commissioners of the Bankrupt ought to have sued out this Writ, and not his Administrator. Mr. Robinson moved now, that this Plea might be set aside, which the Court accordingly did; for, they said, they never allow of any Matter to be pleaded to a Scire facias to assign Errors.

When a Scire facias is brought to assign Errors, how far no Plea can be pleaded to it.

Anonymus.

ONE Burg had been committed for Felony, in being married to two Women at the same Time, and now being brought up by Habeas Corpus. Mr. Kettleby moved, that he might be bailed. He said, the second Woman, whom this Man was married to, was a common Street-Walker, and got herself married to him by a Fleet Parson, when the Poor Man was so drunk, that he was intirely Senseless. Judge Page said, that he was of Opinion, that the Man's Drunkenness would not take his Offence out of the Statute. Accordingly the Court refused to do any Thing in this Matter.

How far the Court will not bail a Man in case of Felony.

Anonymus.

ON Rule to shew Cause, why an Attachment should not be granted against one Elizabeth Mayer and one Dowling for publishing a Libel upon the Proceedings of the Court in a late Trial of Lady Lawley, Mr. Marsh said, that he was Counsel only for Mrs. Mayer, but he hoped, the Rule should not be made absolute against her. He said, Mrs. Mayer's Husband kept a Pamphlet-Shop, and one Day in his Absence Mr. Vaughan came and asked her, whether she had Lady Lawley's Case; the Woman did not know, it was in the Shop; but upon looking into a Drawer of Papers she found it. He said, that he had an Affidavit to produce, that she knew nothing of the Contents. Mr. Vaughan would willingly have bought it of her; she refused to sell it him; but told him he might read it, which he accordingly did. The Court said, that it was beyond all Question, that Attachments have been granted in these Cases; and particularly mentioned Dr. Middleton's Case, where it was so done. The Chief Justice said likewise, that he thought it was not material whether Mrs. Mayer knew of the Purport of this Writing or not. However the Court in general agreed to discharge the Rule as to her; because there did not appear to be any Publication by her. They said likewise,

How far the Court does grant an Attachment for publishing Reflections upon its Proceedings.

wife, that they could not make the Rule absolute as to Dowling; because there was no Affidavit of Service.

The King and Nelson.

How far a
Conviction
must be set
down in the
Paper, be-
fore any Re-
medy can be
given upon
it.

MR. Fenwick moved to quash a Conviction for a forcible Detainer. The Court said, that it ought to be put into the Paper of Crown Causes; before they could do any Thing in it. *Mr.* Fenwick said, that in the present Conviction there was no Fine set; and he apprehended the Distinction to be, that where there is a Fine set, the Party can be relieved against it only by a Writ of Error; but where there is no Fine set, he may be relieved upon Motion. The Court said, that they did agree, there was no Occasion for a Writ of Error; but every Conviction must come on in the Paper, before they can give any Remedy upon it. *Vide post.*

Martin and Moor.

How far Bail
are liable or
not, when
the Plaintiff
recovers a-
gainst the
Principal
more than is
contained in
the *Ac etiam*.

THE Irregularity of a *Scire facias* against Bail having been refer'd to the Master, Serjeant Raby moved now for the Master's Report. Accordingly the Master stated the Fact to be, that the *Ac etiam* in the Original Action was but for 80*l.* the Declaration for 150*l.* the Damages recovered 104*l.* and the Costs 15*l.* 10*s.* that in Pursuance of this Judgment a Writ of Execution was made out for the whole Money; but that the Writ was marked to order the Bailiff to levy no more, than the 80*l.* with the 15*l.* for Costs. And upon this State of the Case the Question was, how far the Bail were liable, or whether they were absolutely discharged. *Mr.* Reeves and *Mr.* Fazakerly argued, that the Bail were absolutely discharged. They said, that by the antient Rule of this Court, whenever a Person was Bail for another in any Action, he was Bail in all Actions that the Plaintiff should commence against the Defendant that Term. For this amongst other Purposes was the Statute of 13 Car. 2. Stat. 2. 2. made; by which it is provided, that every Person shall be discharged upon giving a Bail-Bond of 40*l.* who is arrested upon any Process, wherein the Certainty and true Cause of Action is not expressed. The Construction of which has always been, that the Form of the Writ should not be altered, but only the Sum in Demand with the Nature of the Action ascertained under an *Ac etiam*. The *Ac etiam* therefore is to be the Guide to the Bail; it is that which ascertains the Cause of Action to them; and if the Plaintiff declares in a greater Sum, that is another Cause of Action as to them, and they are discharged. Accordingly they observed, that in a Book, which is called *The Rules and Orders of the Courts in Westminster Hall*, p. 44. there is a Rule of Court to this very Purpose. And in 3 Keb. 16. this Rule is taken Notice of, and allowed. And in the Case of *Cognoni and Garibaldo*, 6 Mod. 266. Lord Holt is of this Opinion, and
cites

cites the Case of Collins and Thompson, determined in Lord Pemberton's Time, directly in Point. They said farther, that if the Law was not so, there might be a manifest Inconvenience to Bail. For a Man might be very willing to be Bail for another, when he took his Debt to be not above 100*l*. but probably he would refuse to be Bail for him, when he found, that it was 1000*l*. Serjeant Raby and M^r. Strange argued on the other Side, that the Bail were liable pro tanto, as is contained in the *Ac etiam*. They said, that they apprehended the Intent of the Statute, which has been mentioned, only was, that the Bail should not be made answerable for any greater Sum, than what they are appoyled of at the Time they became Bail. But still the Forms of the Court ought to be allowed to continue; and as before the Act, Persons were Bail for Defendants according to the Bill upon the File; so now it is the same; and the Form of the Recognizance shews, that this has constantly been the Practice. Then as for Authority, they observed, that the Case cited out of 6 Mod. was an Authority for them; for three Judges were against the Opinion of Lord Holt. And they said, in the Case of Webster and Guerey, the Court seemed strongly of Opinion, that the Bail were liable pro tanto, where the Judgment was not for more than the *Ac etiam*, though the Plaintiff declared for more; but indeed did not give a direct Resolution. Upon Search amongst M^r. Clark's Father's Papers there has been a Note found in the following Words, writ with his own Hand. That no Person, being Bail, shall upon Recovery be answerable for a greater Sum, but shall be liable for such Sum, or any lesser Sum, for which he shall be Bail as aforesaid. And M^r. Strange said, that in the Case of Tanner and Bogden, Pasch 4 Geo. 1. Serjeant Darnel produced a Rule made Trin. 35 Car. 2. in the Case of Ward and others against The Manucaptors of Overton, and he at that Time took a Copy of it, which was in the following Words; *Ordinatum est, quod Defendens onerabilis sit cum quinquaginta & quinque libris in brevi mentionat' tantummodo.* And for farther Authority, Serjeant Raby cited 2 Show. 183. directly in Point. They said farther, that even since this Statute they apprehended the constant Practice of the Court was, that this Recognizance of Bail serves as a common Appearance for all Actions commenced against the Defendant that same Term; these Declarations that are so delivered, are called Declarations by the By; and they did think as certain, that though the Party doth recover more than is contained in the *Ac etiam*, yet if it be under the Sum mentioned in the Declaration, the Defendant is answerable for the Whole. Then as to what was objected by the other Side, that this Declaration, varying in the Sum, shall be intended to be a Declaration in another Action; they said, if it was such a one, it must be, what is called a Declaration by the By, which is a second Declaration; and then the Proof lies upon them, that there was a first. And as to the other Objection, that the Bail might be deceived in this Way, they said, the Plaintiff must be a considerable Loser himself by such a Deceit; and therefore such a Case could not be supposed to happen. The Court declared, that they had considerable Doubts

in this Matter. The Chief Justice said, when a Scire facias is brought against the Bail in such a Case, the Scire facias must set out the very Sum contained in the Judgment; and upon Oyer of the Recognizance, with Oyer of the Writ, he did not see but in strict Law there will be a Failure of the Record. Judge Lee said likewise, that in that Case of Tanner and Bogden, he remembered, Lord Chief Justice Pratt said, that he had talked with most of the antient Practisers, and they seemed to be of Opinion, that the Bail were wholly discharged; and so was that Chief Justice of Opinion at that Time, and likewise Mr. Justice Fortescue. The Court in general too condemned the Authority of 2 Show. and therefore they could not pay a great Regard to that Case. And they said the Rule cited in the printed Book of Rules, is not to be found upon the File; and so it is taken Notice of in that Book. However if these Difficulties could be cleared, they said, they thought, there was great Reason to incline to the other Side of the Question. For besides the Justice and Equity, which there was of that Side, Mr. Clark had informed them, that the Recognizance entred into at a Judge's Chamber is only a Warrant to draw up the Recognizance at full Length; that is not done till the Declaration is filed; then the Recognizance itself is put at the Foot of the Declaration; and the Purport of it is, that the Bail subject themselves to pay the Costs and Damages, which shall be recovered in that Action. And therefore it is certain, that the Bail do often pay the Costs, recovered against the Defendant; and are bound to do so, though it is more, than the Accruiam. Accordingly the Court declared their present Opinions to be rather in Favour of that Side, that the Bail were liable pro tanto. However, as this was a Question, which they believed had never finally been settled, they desired to have farther Light shewn them, by hearing what the antient Practisers could discover. They said, this was a Means of being informed, which was much practised in the Time of Lord Holt, and in a Question of this Nature deserved to be continued. Accordingly this Matter stood over.

Vide post.

Anonymus.

How far the Court will grant an Information in Nature of a Quo Warranto against a Person, in order to try the Validity of his Election.

Vide post.

Serjeant Birch moved for an Information in the Nature of a Quo Warranto against one Bull, to shew by what Authority he took upon himself to be one of the Burgeses of the Borough of New-Radnor. He said, the Validity of his Election would depend upon the Validity of a former Election of one Miles. Upon which Judge Page said, that he had some Doubts, whether it was not necessary then, that the Validity of Miles's Election should be first tried in an Information against him. But in Answer to this the Counsel said, that it was resolved in the Case of the Corporation of Appleby, that this was not necessary; accordingly the Court made a Rule to shew Cause.

Anonymus.

MR. Starkey moved for an Information against one Stephens, a Member of the Corporation of New-Radnor, for receiving a Bribe of one Price to give his Vote upon an Election for an Officer of that Corporation, as Price should direct him, and for giving his Vote accordingly. He said, the Court granted the like Motion in the Case of one Hutchinson of Carlisle; and accordingly a Rule was made to shew Cause.

How far an Information shall be granted for Bribery.

Martin and Davis.

IN an Ejectment for some Lands, which were Part of the Waste of the Manor of Hampstead, Mr. Filmer moved that Proceedings in it might be staid; because it was between the same Parties and upon the same Demise with a former Ejectment still depending. Judge Lee said, in the Case of Baller and Delany the same Motion was refused; accordingly the Court refused the Motion.

How far the Court will not stay Proceedings in one Ejectment till the Event of another be determined.

West and Newman.

MR. Fazakerly moved to discharge a Rule for staying Proceedings upon a Bail-Bond. He said, the Writ was returnable the 20th of October, the Surrender of the Defendant the 28th, an Assignment of the Bail-Bond that very Day, and no Notice given of the Surrender till the 30th; for which Reason he submitted it, that the Proceedings upon the Bail-Bond were regular. But the Court said, when the Bail surrender the Defendant within four Days after the Days of Grace for his Appearance, there is no Occasion for Notice; otherwise they agreed there would. Accordingly the Motion was refused.

When Bail surrender the Principal, how far Notice need not be given of the Surrender.

Anonymus.

ON Motion for an Attachment against one Hooper for not obeying an Order of Sessions, confirmed in this Court, by which he was required to pay 2 s. per Week for the Relief of his Father, the Counsel prayed, that it might be granted without a Rule to shew Cause; and cited the Case of The King and Yelden, where it was so done. The Court said, they took the constant Distinction to be between where an Attachment is moved for Non-payment of Costs and other Cases. Accordingly they only made a Rule to shew Cause.

How far an Attachment cannot be granted, without first making a Rule to shew Cause.

Raw-

Rawlinson and Smith.

How far the Court will discharge a Rule where by Liberty is given to withdraw a Plea.

THE Common Serjeant moved to discharge a Rule, by which the Defendant had Liberty to withdraw his Plea, and plead Nul tiel Record upon Payment of Costs; and this Motion he made upon an Affidavit that the Master had settled the Costs, and the Plaintiff demanded them of him last Night, but that the Defendant had not paid them. Accordingly it was granted.

The King and Melsham.

What Sentence is proper to be passed on a Person that utters false Money.

THE Defendant having been convicted upon two Indictments; the one for coining false Halfpennies; the other for uttering them, knowing them to be Counterfeit; Mr. Reeves moved for Judgment against him. Accordingly upon the first Indictment the Sentence of the Court was, that the Defendant should stand in the Pillory, pay a Fine of 40 s. be committed for two Years, and until he should pay that Fine, and after that find Security for his good Behaviour. Upon the other Indictment the Sentence only was, that the Defendant should pay one Mark.

The South-Sea Company and Colonel Duncomb.

How far an Indebitatus Assumpsit will lie.

ON a Trial at Bar in an Indebitatus Assumpsit for 8000 l. Mr. Reeves stated the Nature of the Case to be, that soon after the South-Sea Company was Incorporated, viz. on the 14th of March 1711, at a general Court it was thought proper, that certain By-Laws should be made relating to their Cash, and amongst others one of their By-Laws was, that the Court of Directors should not vest any of the Company's Money in purchasing any of the Company's Stock without a Consent of the general Court. But in the Year 1720, finding that the Credit of their Stock increased, the general Court thought proper to intrust the Court of Directors with a Power of lending Money upon their Stock. Accordingly in the Month of April in that Year the Court of Directors came to a Resolution to lend 500000 l. upon their Capital Stock at 250 l. per Cent. and afterwards in the next Month to lend another Sum upon their Capital Stock at 300 l. per Cent. and on the 9th of June in the same Year they resolved to lend another Sum upon their Capital Stock at 400 l. per Cent. And the Method of transferring this Stock to the Company at that Time was, by transferring it either to Mr. Knight the Cashier, or to Mr. Surmon, the Deputy Cashier, or else to Mr. Powel, the Clerk of the Treasury, to the Use of the Company. Upon which one or other of them immediately paid out the Money so resolved to be lent. And then took a Receipt from the Borrower for so much Money for so much Capital Stock transferred to the Company. These Receipts were printed, and the Direc-

Directors found that the Words in full for so much Stock was in them; but they thought those Words in full ought properly to be left out; accordingly they gave Directions that they should be blotted out, and most of them were so. The Directors too had thoughts at that Time to have given Discharges upon these Transfers; but through the Hurry of Business at that Time it was found impracticable. At this Time too the common Price of Stock was 700 l. per Cent. Upon the 13th of June, which was but four Days after the Court of Directors came to the Resolution which was last mentioned, the Defendant came to Mr. Surmon, and transferred to him 1000 l. Capital Stock for the Use of the Company; accordingly Mr. Surmon paid him 4000 l. and took a Receipt of him in the following Words, Received of Mr. Surmon 4000 l. being in full for 1000 l. Capital Stock transferred to me to the Use of the Company, John Duncomb. Afterwards on the 29th of August following the Defendant came to Mr. Powel, transferred to him the like Sum of 1000 l. Capital Stock, and received of him 4000 l. and gave him the like Receipt as he did to Mr. Surmon, only the Words in full were blotted out. Soon after the Stock fell very much; upon which on the 30th of September following the Court of Directors resolved to reduce their Subscriptions, which they accordingly did. And afterwards the Statute of 7 Geo. Stat. 2. 1. (6). was made; by which it is provided, that every Borrower upon Stock shall have Liberty to redeem his Stock upon paying 10 l. per Cent. from the Time he lent it within a certain Time specified by the Act. But the Defendant did not think proper to comply with this. Accordingly the Stock continued still as a Loan in the Company's Hands. But they now thought proper to waive that Security, and bring a Personal Action for so much Money had and received to their Use; which Mr. Reeves said, he hoped, they should recover in. The Counsel for the Plaintiffs then went into their Evidence, and began first to prove the Receipt, which the Defendant gave Mr. Surmon. That Receipt was witnessed by one Grigbey, who was since dead. And upon their going to prove his Hand, the Defendant's Counsel objected, that this Witness had Stock in the Company, which continued in him untransferred at the Time of his Death. And to prove this, they called upon the Plaintiffs to produce a particular Book which they had given them Notice to be ready with at the Trial. Upon the Defendant's looking into it, it appeared that the Witness had such Stock, and therefore the Plaintiffs Counsel agreed, they must give other Evidence, that the Defendant had this Money. But they submitted it, that this Evidence need only be the same Book. For the Defendants have made it good Evidence by insisting upon its being produced. But the Court said, they did agree the Plaintiffs had a Right to read any other Passages in it, relating to that Matter for which the Defendants insisted upon its being produced; but they could use it for no other Purpose, accordingly it was disallowed. The Plaintiffs Counsel then said, that they would prove the Hand Writing of the Defendant himself to this Receipt. For which Purpose they called a Clerk belonging to the Company, who said, that he had seen the

Defendant write his Name several Times upon receiving his Dividends; and upon looking into these Receipts which he had signed he did believe this was the Defendant's Hand. But upon his being cross-examined he did agree that many of the Receipts to these Dividends the Defendant did give, when he was not present; and he could not swear which of them in particular he did give when he was present; and owned farther, that if he had not looked upon these Dividend Receipts, he should not have been able to have recollected the Defendant's manner of Writing; so that the only Reason, why he believed this to be the Defendant's Hand, was, that by the comparing the Hands together they seemed to be alike. Upon which Mr. Wills insisted, that this was not Evidence; because the Witness could not swear to one Dividend-Receipt in particular, and therefore could make no Judgment from his supposed Comparison of them together. He said farther, that the Defendant himself was alive and his Hand well known; for which Reason he submitted it, that a Proof by a Comparison of Hands was not the best Proof, and therefore it ought not to be allowed. However the Court said, that they thought there was sufficient Proof given of this Receipt, at least to leave the Credit of it to the Jury; for which Reason the Receipt was allowed to be read. The other Receipt was then proved; and after that Mr. Reeves said, he was ready to shew the great Disproportion which there was between the Value of Stock at that Time and what the Defendant received from the Company; in order to leave it to the Credit of the Jury, whether they could believe that this was intended as a Sale of the Stock, notwithstanding the general Words in the Receipt, or whether they must believe it was intended only as a Security. But Mr. Acherly objected to this Evidence, that a Corporation can only transact these Matters by Writing, and not by Parol; and therefore no Parol Evidence ought to be admitted to explain this Evidence. He said likewise, that he submitted it, the Plaintiffs must be non-suited upon the Evidence, which they have produced already; for the Action, which they have brought is a general Indebitatus Assumpsit; that Action will not lie but where Debt will lie; and therefore he apprehended, that they ought to have declared upon a special Agreement. But the Court said when a Writing is produced in Evidence it is frequent to explain it by collateral Evidence. And they did think it very clear that this Transfer could be considered only as a Deposit. To the other Objection the Court gave no Answer then; nor in summing up the Evidence did they regard it. Mr. Wills said too, that he certainly must admit, that this was considered as a Loan or Deposit, and therefore he would not insist upon the Plaintiffs giving this Evidence, which they offered. But he did submit it, that upon the Whole of what they have produced no Action can be maintainable; he said, they had got their Security, and that Security they must abide by. He observed that the Distinction in the Books was fixed and certain between a Pledge and a Mortgage; that where they are generally made without a particular Agreement, an Action of Debt will lie for the Money secured by the Pledge, but not for the Money secured by the

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the Mortgage. And for this Purpose he relied upon the Cases in 2 Cro. 244, 281. Yel. 178, 206. 2 Lev. 116. 3 Keb. 460. The Reason for which Distinction he apprehended to be, that every Contract ought to be mutual; the Pawner has a personal Remedy for his Pledge at any Time during his Life; and therefore it is reasonable that during that Time the Pawnee should have a personal Remedy against him. But the Mortgagee has no Remedy by Law upon the Person of the Mortgagee; and therefore it is not reasonable, that the Mortgagee should have a personal Remedy against him. And in the present Case he did submit it, that the Defendant had no Remedy at Law for his Stock against the Plaintiffs; for which Reason the Plaintiffs could have no Remedy against him. The Remedy at most was only in Equity. He observed farther, that in the present Case, the Offer of lending Money upon the Stock was an Offer proceeding from the Lenders, was made by them with a View, that thereby their Stock might receive the greater Credit; and therefore if this Stock should be considered as a Pledge, and consequently an Action lie against the Person of the Borrowers, if there was nothing particular in this Transaction; yet that Matter, which has been mentioned, must have this Influence, as to make every one believe, that the single Credit of the Stock was in this Case relied upon. The Defendants Counsel then thought proper to produce very little Evidence on their Parts, but to leave it upon what had been said. Upon which the Court entred into a Consideration of this matter amongst themselves; and at last the Chief Justice summed up the whole Evidence, and declared the Opinion of the Court to be, that if the transfer'd Stock was believed by the Jury to be in the Nature of a common Pledge, and nothing more, the Action which the Plaintiff brought would well lie, and the Jury ought to find for him. But if the Jury were of Opinion, that this Evidence amounted to a special Agreement that the Plaintiffs would require no other Security but the Stock, then the Jury ought to find for the Defendants. Accordingly the Jury went out for some Time, and then brought in their Verdict for the Defendants.

George and Norman.

THIS Matter coming on again, Judge Lee made an Objection, before the Counsel entred into their Argument, that the Writ in itself was insufficient; and if that was so, to be sure there could be no Pretence to say, that the Fault in the Declaration could be supplied by it. Now in the Writ itself, the Complaint is only quare, &c. and in Salk. 636. this is held to be as bad a Fault in a Declaration, as quod cum. To this Mr. Fazacherly answered, that the Form of the Writ is always so; for the Sheriff is required by it to summons the Party to shew, why he has done or has not done such a Thing. The Chief Justice said, that there was another Difficulty with him against the Recital of the Writ's being considered as Part of the Declaration in the Common Pleas, and helping the other Part

Vide ante
Vol. 2. 446.

Part of it, and that was, that these Recitals are sometimes so short as even *attachiat' ad respondend'* has been held sufficient. In answer to this Mr. Pazacherly said, that in those Actions, where there is an Averment of the Fact laid in the Declaration, after what is introduced by a *Quod cum*, he did agree, *Attachiat' ad respondend'* had been held sufficient; for there nothing in the Declaration wants to be supplied by the Writ. But in these Actions of Trespass, there is no Fact laid in Introduction of another; and therefore if what is first alledged in the Declaration cannot be helped by the Recital of the Writ, it cannot be helped at all. For which Reason, in these Cases he believed the Recital of the Writ was always laid more special. The Chief Justice, however, declared, he continued his former Opinion, and chiefly for the Reason mentioned in his former Argument. Judge Lee owned at present, that he continued too of the Opinion he was before. He did agree, that till the Cases cited out of Sid. he believed it was never thought of, to make Faults in the Declaration in the Common Pleas supplied in the manner that has been mentioned. And indeed there are Cases, he said, in each of the Volumes of Cro. which shew, that no such Thing was at that Time conceived. But since the Cases in Sid. he believed, the Law has been taken to be settled that way. And one of those Cases was allowed upon a Writ of Error in this Court. The Court in general said, that they thought this a Matter proper to be considered of farther; and therefore ordered it to stand over. But Judge Page quoted a pretty strong Case out of Sir Thomas Jones 197. which was upon a Judgment in the Common Pleas in Ireland, where the Proceeding was by original, as here, to shew, that he inclined to be of Opinion with the Chief Justice. Vide Post.

Speak qui tam *and* Bourn.

Vide ante
Vol. 2. 450.

MR. Reeves now argued for the Plaintiff, and said, that there were three Questions, proper for the Determination of the Court in this Matter; first, Whether a Parish-Clerk can make a Deputy; secondly, Whether a Parish-Clerk is a temporal Officer; thirdly, Whether a License is necessary. To the first Point, he observed, that in Roll's Rep. 274. and in Moor 845. it is resolved, that a Constable may make a Deputy; and in the same Place in Rol. it is said, that a Dean may; and yet in Rep. 13. a Dean is held to be a spiritual Officer. And he submitted it, that the general Distinction in our Books was, between Officers that are judicial and those which are ministerial only. To the second Point, he did agree, that in some Places in the Books, a Parish-Clerk is said to be a spiritual Officer; but when this Question has come judicially before the Court, they have always considered him as a temporal Officer: For which Purpose he cited Rep. 13, 70. Marsh. 101. 1 Keb. 286. He said, he apprehended, that the different manner of appointing a Parish-Clerk could not possibly make the Office itself different in one Case from what it is in another. In some Places, Church-Wardens are chose by the Parish, in others they are appointed

appointed by the Parson; but yet the Nature of the Office does in all Cases continue the same. In the present one, he did agree, that the Exercise of the Plaintiff's Office was circa spiritualia; but yet it will not follow, but the Right and Title to the Office, may be of a temporal Consuance. And in the Case in Question, the Libel complains, that the Plaintiff intrudes upon the Defendant; by which the Title to his Office is evidently in Dispute. And upon this Head was cited 2 Roll's Abridgment 285. 2 Brownlow 11. Mandamus's have often been granted to admit these Officers, as appears by 1 Lev. 75. 2 Lev. 18. Ven. 143. To the third Point, he said, the Proof of that lay upon the Defendant; and it would not be enough neither for them to shew, that there was a Canon which required a License; but they must shew farther, that such Canon has been received and allowed by the Common Law. Mr. Marsh argued on the other Side, and said, that the Case cited out of Roll's Reports, of a Constable's making a Deputy, has been called in Question, and so it was in Sid. 355. And as to the Case of a Dean's making a Deputy he did agree, that in some Places there is a Vice-Dean; but he believed that depended only upon local Statutes; and he apprehended, that is never received for Law, that he could make a Deputy; at least at this Day, undoubtedly, the Law is taken otherwise. He said farther, that the Distinction that has been made between judicial and ministerial Officers must not be received in so great a Latitude; for there is a Difference between some ministerial Officers and others. Those that require Skill and Judgment cannot make a Deputy, without express Words in their Patent; though others, he agreed, might: For which Purpose he said, it was held in 2 Roll's Abridgment 154. that the Marshal of England cannot. And in Dyer 278. it appears, that there was a Clause in his Patent, giving him a Power to do it. And for the Authority upon this Head, he rely'd upon 3 Cro. 187. Plow. 379. b. And to shew that the Sense of the Legislature has lately been, that a Parish-Clerk cannot make a Deputy, he said, in a late Act of Parliament, which passed the third of this King, and which was made for creating the Parish of St. Nicholas Deptford, it is provided by an express enacting Clause, that the Parish-Clerk shall have a Power of making a Deputy. Then as to the Question, Whether this Office was spiritual or not, he said, he submitted it, that the whole Employment was so. He observed too, it was known, that antiently, Parish-Clerks were of the Order of the Clergy, and not of the Laity. And in 2 Roll's Abridgment 227. it appears, that by the Canon the Parson has a Right to appoint him. And as to Mandamus's going to admit Parish-Clerks, he believed, the Court did not grant those Motions, but upon an Affidavit that they were elected by the Parish; and for this Purpose cited Sal. 468. To the last Point he said, that he must agree, that he could find no Canon, which made these Licences necessary; but the innumerable Instances of them was an Evidence, that such Canon has been made and allowed, though at this Day it cannot be found. And the ecclesiastical Courts are governed by the Lex non scripta, as well as ours. The Chief Justice said, that the Marshal was

considered partly as a judicial Officer; for wherever Battle is joined, he is to determine that Matter. And he said it was certain, that even a ministerial Office, which requires Skill, cannot be executed by Deputy, without Words in the Grant for that Purpose. He said, he had some Doubts, how that was to be understood of a Constable's making a Deputy; for if a Justice of Peace directs his Warrant to him, he should question, whether the Constable could appoint by Word of Mouth, that another should execute it. As to the Nature of the Office, he said, he was well satisfied, that the different Methods of appointing this Officer could not make his Office different in one Case from what it was in another. The Case of Townsend and Thorp, he said, was determined intirely upon its particular Circumstances. The Temporal Court permitted the Ecclesiastical to deprive the Party there, singly, by Reason of the Enormity of his Crimes. The Licence, he said, he could not see how it could be maintainable. The Suit below too was principally instituted to deprive the Party for his not obtaining one; and therefore he thought the Prohibition must stand. Judge Page said, he was clearly of Opinion, that the different Methods of coming into an Office could in no Case make the Office itself to be different. In the Case of St. Clements, he believed that the Court was of Opinion, that this Office was temporal. If so, this Court would not suffer the Court below to deprive him. However, even in the Case of a Donative, he took it, they might suspend. Judge Lee said, that the Question, whether this Office is spiritual or not, strikes at the whole. He did agree, that the Business of the Office was, circa spiritualia. But yet he could not see but the Office must be considered as temporal. A custom for the Parish to choose such Officer is agreed on all Sides to have been good. If his Office had been considered as spiritual, he could not see how the Lay Gents could have had any thing to do with it. And therefore he thought the Canon seemed in this Respect to be an Innovation upon the Common Law. As to the Office of a Dean, he said, it was certain, that that was many Times, till Queen Mary's Reign, executed by a Lay-man. The Court, upon the whole, thought the Prohibition must stand; however, gave Leave for another Argument, upon the Defendant's desiring it.

Vide Poll.

Anonymus.

How far an
Information
shall be
granted for a
Nuisance to a
Highway.

MR. Reeves moved for an Information against one Thomson, for digging a Ditch cross a Turn-Pike Road leading from Woodstock to London; and the Court accordingly made a Rule to shew Cause.

Dilley

Dilley and Polhill.

THIS Matter coming on again, Serjeant Hawkins said, that it was very true, this was an Action brought upon the Award itself, for the not performing it; but he observed, that it was laid in the Declaration, that the Defendant obliged himself by this Deed to stand to this Award; and therefore there was no occasion to lay a mutual Agreement. He said, the Plaintiff would have declared upon the Bond itself; only then the Defendant would have pleaded a Tender at the Day, without an uncore prist, as the Bond was given to do a collateral Act. And if the Party had declared upon the Bond, it would have been good beyond all Question. To which Purpose he cited Saun. 164. 2 Ven. 239. Lut. 550. For which reason, he submitted it, it was equally good in this Case. Judge Page said, that he had looked into some of the best of the Entries, and he found, that in Actions founded on the Award, they constantly laid a mutual Submission of the Parties; And particularly he cited Rast. 153. The Court said too, that in the Cases cited by the Serjeant, the Defendant pleaded over; and by that means admitted the Submission. But here, as there was a Demurrer to the Declaration, the Court must give Judgment, whether the Submission appeared to be sufficiently laid, or not. And they thought, it did not; however, gave Leave for another Argument. Vide Vol. 2. 448. Vide post.

Hayes and Warren.

UPON a Writ of Error on a Judgment by Nil dicit in Assumpsit, Mr. Theed, Jun. said, that there were several Counts, and intire Damages have been given; but he submitted it, one of them was bad. The Count was for Work and Labour done; and he did agree the Work and Labour was said to be done for the said Charles Warren the Defendant; but he submitted it, that was not enough, without alleging, that the Work was done at the Defendant's Request; and for this Purpose he cited 3 Cro. 42, 382. Judge Page said, that upon this Issue the Plaintiff would not have been bound to have proved that the Work was done at the Defendant's Request; and if it was done at any Body's else, he ought to be the Paymaster and not the Defendant. The Court seemed to be of the same Opinion. However this Matter stood over. What shall be a good Count in an Assumpsit for Work and Labour done. Vide post.

The King *and* The Justices of Nottingham.

The Certain-
ry required
in a Return
to a Manda-
mus.

What shall
not be said to
be a good
Writ of
Mandamus
which is di-
rected to Ju-
stices of
Peace.

A Mandamus having been granted to require the Justices of the Town and County of Nottingham, to order the Church-wardens of the Parish of St. Mary in that Place, to pay to the Church-wardens of the Parish of Kirdlington in Yorkshire such Costs as were reasonably expended by them in maintaining one Henry Bell, between the Time of his being removed to them from the Parish of St. Mary by an Order of two Justices, to the Time of such Order being set aside at the Quarter-Sessions for the said Town and County. M^r. Fazakerly said, that the Justices had made a Return; but he apprehended it was insufficient. He said, this Mandamus was founded upon the Statute of 9 Geo. (8). But the Return has not complied with it. For the Words of the Return are, that they did order the Church-wardens of the Parish of St. Mary to pay the Sum of 30 s. to the Church-wardens of the Parish of Kirdlington, such Sum according to our Directions being reasonably paid by the Church-wardens of the said Parish of Kirdlington. Now, he said, this Sum of 30 s. might have been a Sum, which was reasonably paid by them, but it does not follow but there might have been more Sums of the same Nature. And he submitted it, if an Action was brought against the Justices for a false Return, and it should be proved upon the Trial, that there were such other Sums, the Plaintiff could not recover. Judge Page said, that he took it, the Legislature had intrusted the Justices with an absolute Power of judging in this Matter; and he did not think such Action would lie. The Court declared too, that they thought, the Return was certain enough. But afterwards they took Notice, that by the Words of the Act the very Justices only, which allow of the Appeal, can assess the Costs; and therefore they thought the Mandamus ought to be quashed, for ordering Justices at another Quarter-Sessions to do this. To this M^r. Fazakerly said, that the Words in this respect were to be construed only by way of Direction, like the Case of Overseers. However the Court quashed the Writ.

The King *and* Lane.

Vide Vol. 2.
414.

MR. Reeves now moved for Judgment. He said there were two Offences laid in the Indictment; one for not executing the Office of Constable, the Defendant being chosen in the Leet; the other for not executing this Office, the Defendant being a Freeman in London, and chosen Constable at one of the Wardmotes. He said, it has been objected, that the Defendant is not indictable for refusing to execute the Office of Constable, being chosen for that Purpose at the Leet. And if that should be admitted, the King is intitled to Judgment upon the other Part of the Indictment, for the Defendant's not executing this Office, being chosen at the Wardmote. And as to that, he said, the Wardmote is a Court held before the

the Alderman of the Ward. Constables are presented there; that Presentment is delivered by the Alderman of the Ward to the Court of Aldermen, and before them the Constables are sworn; so that there is no Power of punishing such Constables in the Wardmote; and therefore if the present Indictment does not lie, there is no Method of punishing them at all. But he did submit it, that the Defendant might be punished even upon the first Part of the Indictment. For this Purpose, he said, many Cases might be cited of Indictments of this Sort having been brought in this Court, other Exceptions taken, and upon some of those Exceptions Judgment arrested, upon others Judgment actually given for the King; and yet this Exception not attempted to be made Use of. Accordingly he cited 3 Keb. 230. Sid. 272. Comb. 416. Skin. 669, and Ven. 344. Mr. Abney on the other Side said, that it is certain, that the received Notion in the Law-Books is, that a Wardmote is of the same Nature with a Leet; there is nothing said in this Indictment to shew it to be different, and therefore he submitted it, that it should be taken to be the same. Then as to the general Question, whether an Indictment would lie against a Man, for not executing the Office of Constable, being chosen into it at the Leet, he submitted it, that it would not. That the Leet is the proper and ordinary Place for this Business cannot be doubted. It is held so in Bulst. 174. Sav. 93. Salk. 195. and many other Books. That this Offence is not indictable at the Sessions, he said, was as certain. 'Twas held so in the Case of The Queen and Wheethorp, Mich. 8 Ann. and there the Case of The Queen and Dummer was cited Trin. 2 Ann. The same Point was resolved in the Case of The King and Beel, Trin. 7 Geo. 1. And in the Case of The King and The Constables of Limington, Pasch 1 Geo. 2. this Point was settled upon Debate. He said, if this was so, this would be a strong Argument, that this Offence was indictable no where. And for Authority directly in Point he again mentioned the Case of The Queen and Dacey, which he cited upon the former Argument. He said, he had since more fully inquired after that Case. He had found that many Gentlemen at the Bar had taken a Note of it. And their Notes all agreed, that the Court declared their Opinion to be, that no Indictment would lie for this Offence. He said however, that he must own, that Matter came only on upon Motion to quash the Indictment, and the Court only made a Rule to shew Cause. The Court said, that they thought the Cases of Indictments at the Sessions being quashed were not material to the present Question. For till the Statute of 13 & 14 Car. 2. 12. (15). it is beyond all Question, that they had no sort of Jurisdiction in this Matter relating to Constables. And that Statute has only given them a limited Jurisdiction in appointing Persons to execute the Office of Constable in particular Cases, till the Leet is held. They did agree, that the Case of The Queen and Dacey was a strong Case; but they said it was known, that Rules of that Sort were often made of a sudden; and therefore the Authority of that Case cannot be so great as the Authority of many others. Judge Lee said, that he did believe indeed, a Justice of Peace might swear

in a Constable before the Statute of Car. and so he may at this Day, though chosen at the Leet, as Conservator of the Peace; and he remembered Lord Holt was of that Opinion. But he remembered likewise in the Case of Fletcher and Ingram, Hil. 7 W. 3. Lord Holt said, a Constable might be indicted for not executing his Office. And as to the Authority of the Leet in this Matter, he said, it was a Doubt, whether the Jury has a Right of amercing, or the Steward of fining for this Offence. Accordingly the Court gave Judgment for the King.

Deemes and Panston and others.

How far the Court will grant an Information for a Rescue notwithstanding the Rescue be not returned.

ON Rule to shew Cause, why an Information should not be granted against the Defendants for a Rescue, Judge Probin said, that the Rescue ought to be returned, before this Court will do any Thing in it. But Mr. Hussey informed them, that this was a Rescue of Goods upon a Writ of Execution; for which Reason the Sheriff ought to have maintained his Possession, and cannot return a Rescue. Accordingly the Court made the Rule absolute as to Panston, and discharged it as to the others. (Chief Justice absent.)

Marshall and Cope.

How far a Rule to assign Errors de Record, shall be laid to be irregular.

MR. Parker moved to set aside a Rule for assigning Errors de Record; because the Defendant in Error had not given a Rule to assign Errors upon the Return to the Scire facias. Mr. Strange on the other Side submitted it, that such Rule was not necessary. But upon Mr. Clark's informing the Court that it was; the Rule that had been obtained was set aside. Chief Justice absent.

Anonymus.

Within what Time a Motion may be made to put off a Trial.

MR. Morley moved to put off a Trial, which was to come on this Afternoon, upon an Affidavit, that one of the Defendant's material Witnesses was taken dangerously ill this Morning, so that he could not attend at the Trial. He had an Affidavit likewise, that Notice of this Motion was left at the Attorney's Chambers. But the Court said, as it does not appear that any Body was in the Chamber, that Notice was not sufficient. Accordingly the Motion was disallowed. Chief Justice absent.

Forwood and Duffen.

ON Rule to *Shew Cause*, why a *Capias ad Satisfaciendum* should not be set aside for its being taken out after a Writ of Error allowed, the Counsel for the Defendant in Error said, that it was very true, the Plaintiff put in Bail to the Writ of Error at a Judge's Chambers, but the Defendant's Attorney gave two Rules for him to justify his Bail; upon which the Plaintiff proposed to justify likewise at a Judge's Chamber; but the Defendant's Attorney declared he would not agree to it. Notwithstanding this the Plaintiff's Attorney came to the Judge's Chamber, and did justify; and the Counsel did agree that the Defendant's Attorney was there present, and did not oppose it; but, he said, he was there upon other Business; and therefore he submitted it, that his being there and not opposing it was not material. He observed farther, that the Plaintiff's Attorney was one of the Bail; and it has been an old Rule of this Court, that such Person shall not be Bail for his Client; and in the Common Pleas this Rule is to this Day strictly followed. For which Reasons he submitted it, that the Execution was regular. On the other Side it was insisted, that the justifying at a Judge's Chamber was regular even without Consent; and therefore it was prayed on that Side, that the Rule might be made absolute. The Court said, that the Rule that has been mentioned, against Attornies being Bail for their Clients, was made for the Benefit of Attornies; but of late it has not been observed. So they thought that Matter regular enough. But as to the other, they said, Bail never can justify at a Judge's Chamber without Consent; and they did not think this was a Consent. So the Rule was discharged.

How far Bail cannot be allowed to justify at a Judge's Chamber.

Dowfen and Hayward.

MR. Strange moved, that a Judgment and Execution might be set aside, for want of a Four-Day Rule given upon the *Postea*. M^r. Fazakerly on the other Side answered, that the Plaintiff gave Notice to tax the Costs eight Days after the Beginning of the Term; accordingly the Costs were taxed, and Judgment signed the tenth Day in the Defendant's Presence, and he never made any Complaint of this Irregularity at that Time; for which Reason he submitted it, that the Complaint was now too late. M^r. Strange by way of Reply took Notice, that at the Time the Judgment was signed the Defendant was not acquainted with this Irregularity; and therefore it would be hard to construe his not complaining of it to be a Waiver of it. But besides he beg'd Leave to submit it, that he could not waive it. For the Crown is intitled to the Stamps upon this Rule; and the Officer is intitled to his Fees. The Court said, that beyond all Question, the primary Intention of these Rules being requisite was not, that thereby a

What shall be said to be a Waiver of a Day Rule to be given on the *Postea*.

Duty

Duty might arise to the Crown, and Fees to the Officer; but that the Party might have due Notice given to him before the Signing the Judgment. For which Reason they thought it clear, that the Party himself might waive this Rule. And they said farther, that they were of Opinion he had waived it. Accordingly the Motion was not allowed.

The King and Spretbury.

What shall
be a good
Arrest of a
Sheriff's Bai-
liff.

ON Motion for the Master's Report Mr. Strange said, that the Delivery of a Writ into the Sheriff's Office is a good Arrest of a Sheriff's Bailiff; because the Sheriff cannot return a Non est inventus. Which was not denied.

Anonymus.

How far an
Information
will lie a-
gainst a Per-
son for refu-
sing to let
Judges hold
their Court
in the Place
which they
used to do.

Serjeant Chappel moved for an Information against one Ree for refusing to let the Justices of Peace for the County of Worcester hold their Sessions in the Town-Hall belonging to the Corporation of the City. He said, the Judges have held their Assizes, and the Justices of Peace their Sessions, there, Time out of Mind; and in the Charter given to the Corporation by King James I. there is an express Salvo, that the Town-Hall shall be free for such Purposes. He took Notice likewise, that the Gentlemen of the County had contributed very largely of late to the Rebuilding and Beautifying that Place; and therefore the Attempt that has been made of excluding them from holding their Sessions there, is of a very extraordinary Nature. Judge Page said, in the Case of one Ferrars he remembered there was a Bill brought in the Court of Exchequer. And upon the Hearing it appeared, that a Father had been Tenant for Life, the Son Remainder Man in Tail; the Father agreed with a Dutchman, that he should build a Mill upon Part of this Estate, and the Son was privy to this Agreement, saw the whole Work go on, and never opposed it till his Father's Death; the Court in that Case granted a perpetual Injunction. Accordingly in the present Case the Court made a Rule to shew Cause.

Loving and Averey.

How far the
Court will
set aside a
Judgment
by reason of
a Rature.

ON Rule to shew Cause, why a Judgment and Execution should not be set aside, for making a Rature in the Return of the Latitat, and the Judgment being signed too soon, even notwithstanding the Return of the Writ, as ruled; Mr. Strange said that the Fact was, that the Plaintiff's Attorney gave a Præcipe or Note to the Sheriff to make out a special Latitat, Telle the first Day of the Term, returnable in un' Mens' Sti. Michaelis; the Sheriff accordingly took one of the printed Forms, wherein were the Words prox' post, blotted out those Words, and made the Writ returnable die Mercurii

in un' Mens' according to his Discretion. By Mistake the Sheriff made his Warrant wrong; for the Words prox' post were in that. The Bailiff however did not take Notice of the Day of the Return as it was in the Warrant; but took it for granted it was according to the Plaintiff's Intention. Accordingly made his Arrest before the un' Mens'; but finding that there was not Twenty-four Hours between the Arrest and the Return, was under some Difficulties how he should comply with the late Act of Parliament. For which Reason he proposed, that no Bail-Bond should be taken; and that the Defendant should be discharged from the Arrest upon his Attorney's agreeing, that the Defendant should appear and find Bail above. This Proposal was agreed to. Bail above was regularly given; the Defendant served with a Copy of the Declaration; Rules given to plead; and for want of a Plea, Judgment signed the 9th of November, and Execution taken out that Day. Upon this State of the Fact, Mr. Strange said, there could be no Pretence of any Misbehaviour in altering the Writ; and therefore the single Question would be, whether the Judgment was not regularly signed in Point of Time. As to that, he did agree, that if the Return of the Writ was not regular on the second Return-Day, the Defendant was intitled to an Imparance; and if so, undoubtedly the Judgment could not be maintained. But he submitted it, that the Return was regular. He said, he always took it, that the settled Distinction was, between Proceedings by Original and Proceedings by Bill; that in the Proceedings by Original the Writs are returnable at a general Return-Day; but in the Proceedings by Bill they are returnable at any Time. For which Reason he apprehended, that the Judgment was regular. Mr. Draper argued on the other Side, and said, that this was a Proceeding by Special Latitat, which is different from the Proceeding by a common one. He said, he submitted it, that the Proceeding by Special Latitat was designed to be made like the Proceeding by Original; and in that Proceeding the Capias must have eight Days for the Return. He said farther, that the Difficulty which the Bailiff lay under in executing the Process of the Court, ought by no Means to put any Inconvenience upon the Defendant. Now if the Defendant had regularly given a Bail-Bond, the Condition of it must have been, that the Defendant should appear at the Return contained in the Warrant, and not at the Return contained in the Writ. For which Reasons he hoped, that the Rule should be made absolute. Judge Page seemed to say, that if the Defendant had given a Bail-Bond, he must have entered into it at the Sheriff's Office, and not given it to the Officer that made the Arrest, by Reason that the Arrest was in London. And upon the Whole, the Court took it, that the Judgment was regular. Upon which Mr. Draper prayed, that the Court would however set it aside, tho' strictly regular, upon Payment of Costs and pleading an Assignable Plea, so as that the Plaintiff may go to Trial within the same Time as he might have done, if they had pleaded according to the Rules of the Court. The Plea, he said, was, that the Bond, upon which the Action was brought, was given

upon a Usurious Consideration. And the Defendant offered to verify the Truth of it by an Affidavit. The other Side offered to make an Affidavit, that the Plea was false. Upon which the Court said, that these Pleas are very often Sham-Pleas, as well as the Pleas upon the Statute of Limitations; for which Reason the Chief Justice said, that he doubted, whether the Court had ever gone so far, as to set regular Judgments aside upon these Terms. However, the Counsel at last agreed amongst themselves, that they would go to Trial upon this Plea of Usury, upon the Defendant's entering into a Rule to deliver it to morrow, take Notice of Trial within Term, bring no Writ of Error, nor Bill in Equity, pay the Costs, and let the Goods remain in the Sheriff's Hands, with the Judgment for a Security. Accordingly, this Rule was entered into by Consent.

The King and Paxton.

How far the Court will grant an Information against a Person for endeavouring to poison another.

ON Rule to shew Cause, why an Information should not be granted against the Defendant, for endeavouring to poison one Smith at Gibraltar, and several Parts of the Seas in coming over from thence, Mr. Pazacherly said, that he had a great many Affidavits to produce, explaining this Fact; but he apprehended a very short Answer might be given to this Complaint; and that is, that this Court has no Jurisdiction, in as much as the Facts were done beyond Sea; and all Offences punishable by Indictment or Information are local. Mr. Reeves on the other Side said, that he did agree, Indictments are local; but it might be doubted whether Informations were so; and for this Purpose cited Ven. 183. The Court declared their Thoughts at present to be, that there was no such Distinction. However, if Mr. Reeves could find proper Authorities to support this, they gave him Liberty to move it again; so enlarged the Rule for a Day or two. Vide post.

Woolaston and Walker.

Vide ante 14

MR. Marsh now argued for the Plaintiff in Error. He said, the Action in the Court below was an Assumpsit on a Promissory Note, and brought by the Plaintiff there, as Administrator de bonis non of one — Clark, pendente Lite, about the Probate of a Will of Francis Clark, Executor to the said Clark. The Defendant there let Judgment go against him by *cognovit Actionem*. But Mr. Marsh submitted it, that the Action would not lie. He said, it was not to be disputed but at Common Law the Ordinary could maintain no Action, nor could any Action be maintained against him; and so is the Authority of Plow. 278. The Statute of 2 West. 19. appointed, that the Ordinary should be subject to Actions. And the Statute of 31 Edw. 3. 11. has required that Administrations shall be granted; and at the same Time provided that such Administrators should be capable of commencing Actions, and of having Actions commenced against

against them. The other Statutes have only given Directions to what Persons Administration shall be granted, and about the manner of Administrators disposing of the Effects. From this short State of the Case relating to Administrators, he apprehended it to be clear, that none of these limited Administrators are capable of commencing Actions by the Rules of Law. He did agree that they were capable of collecting in the Goods; because these Letters of Administration might be construed in the Nature of Letters ad colligenda bona Defuncti. For which Reason, if these Administrators have taken upon them any farther Power, it was Time now to put a Stop to them. But there was more particular Reason to do this in the present Case; because this Sort of Administration has been condemned by the Judges; as may appear, not only from the Case in Moor 636. and in Carth. 153. but from 5 Rep. 33. and 3 Keb. 54. The Chief Justice owned it to be his Opinion, that it was very difficult to shew by the Rules of Law, how these limited Administrators were capable of commencing Actions. But he said, the Judges of the present Time find that former Judges have allowed them; the present Judges, therefore, must walk in the Steps of their Predecessors, and by Reason of the many Precedents must now allow them. However, on the other hand, he said, he believed it had never been settled, that these temporary Administrators can bind the Property in an arbitrary manner, as other Administrators can; and therefore if they should commit a Devastavit, by changing the Possession of the Goods, he should much doubt, whether that Act would change the Property. Judge Lee said, that the Authority of the Case in Carth. was what principally occasioned his Doubts upon this Matter on the former Arguments. But, he said, he had since ordered the Roll of that Case to be searched. Accordingly it was found that that Plea in Abatement, in Relation to the Validity of this Administration was there wad, and Judgment is actually entered up for the Plaintiff; so that he supposed there was only a Rule made to shew Cause in that Case. He said, that the objection against the present Action could only be founded upon its appearing to the Court, that the Administration is void; sed non constat that there is a Will, and therefore the other Matter cannot. If it had appeared to the Court that there was a Will, and the Dispute was only who should prove it, that he said was a Question which he did not think it necessary for him to give an Opinion upon at present. Upon the whole Matter, the Court declared their Opinions, that the Action was well brought; accordingly affirmed the Judgment.

Acherley and Bell.

When a Rule is made for the Inspection of publick Books, what shall be said to be a Breach of such Rule.

Serjeant Chapel mov'd for an Attachment against the Defendant, for not letting the Plaintiff take a Copy of the Poll-Books in Pursuance of the Rule, which gave him Liberty to take a Copy of all publick Books. The Court inclined to think, that a Poll-Book was not within the Rule; however, made a Rule to shew Cause.

Jones and Stanley.

What shall not be said to be a Waiver of the Benefit of a Plea of a Purchase for a valuable Consideration without Notice.

Scac. **O**N Demurrer to a Plea of Purchase without Notice, Mr. Bootle objected in the first Place, that the Plea was informal for not concluding with an Averment; and cited the Case of *in this Court*, where a Plea was held to be bad upon this very Exception about three Years ago; and Mr. Bunbury said, that he remembred that Case, and it was so. He said, that he apprehended the Plea was bad in Substance likewise, for its being only alledged in the Plea, that he had no Notice at the Time of executing the Purchase Deeds; whereas, if he had Notice at any Time before the Payment of the Purchase Money, such Notice would be sufficient. And in the last Place, he submitted it, that the Defendant had waiv'd his Plea, by answering over to the Notice, and denying it in his Answer. To the first of these Objections the Chief Baron observed, that such Defect in Form was helped by the Statute for the Amendment of the Law, upon a general Demurrer; and therefore he thought it clear, this must be equally helped in a Court of Equity. To the second he said, it was certainly true, that if the Defendant had Notice before the Payment of his Purchase Money, he should not have the Benefit of this Plea; but yet he thought, there was enough let out in the Plea to have put the Plaintiff upon alledging the other Fact in his Replication. And as to the last, he took it, that in Case of a Plea of a Purchase bona fide, the Defendant constantly denies Fraud in his Answer; for which Reason he thought, that the denying Notice in the Defendant's Answer, in the present Case, could by no Means be said to be a Waiver of the Plea of Purchase without Notice; accordingly the Demurrer was over-ruled.

The Bishop of London and The Mercers Company.

Vide Vol. I. 459.

THIS Matter was now argued again by Mr. Fazacherly, for the Plaintiff in Error; and by Serjeant Eyre for the Defendant. The same Points that were before argued, were now spoke to again; and upon the whole, the Court declared themselves well satisfied as to the Merits of the Plaintiff's Title; and therefore would not have that Point argued any more. But as to the

the Form of the Plaintiff's declaring they thought that might be proper to be farther considered of. Vide Post.

Pool and Hamerton.

ON Rule to shew Cause why the Plaintiff should not have Leave to amend his Declaration upon Payment of Costs, and Liberty to plead de novo, Mr. Kettleby said, that the Defendant had demurred, and the Plaintiff joined in Demurrer, and the Roll actually made up; for which Reason he submitted it, that the Rule ought to be discharged. But the Court said, this was only a loose Roll of this Term, and therefore they would consider it as all in Paper; accordingly they ordered that the Rule should be made absolute. Upon which Mr. Kettleby desired, that they might have four Days to demand Oyer; though he did agree they had not demanded it yet. The Court said, if the Defendant had demanded Oyer before, and it had been refused, he would have a Right to have four Days now to demand it, without Leave of the Court; but as he did not, it was necessary to apply to the Court for this; and they gave him two Days for that Purpose.

How far the Court will give Liberty to amend a Declaration after Joinder in Demurrer.

The King and Wakelyn and others.

ON Rule to shew Cause why an Information should not be granted against the Defendants Church-wardens and Overseers of the Poor of St. Giles's Shoredich, for forcing a Person to go into the Clokhhouse there, without her Consent, notwithstanding she had 120 Pounds by her, and for taking away that Sum of Money from her. Mr. Fazacherly said, that he had Affidavits denying all the criminal Part of the Charge, and explaining the whole Nature of it; for which Reason he hoped, that the Parties making this Complaint should be left to their ordinary Remedy. But Judge Page said, he took the constant Rule of the Court to be, that, wherever there is sufficient Cause shewn for granting an Information, if the Fact be true, they will always make the Rule absolute, if the Fact be denied, in order that it may be tried. Accordingly the Rule was made absolute in the present Case; and afterwards the same Day, in the Case of Birch and Arkyns, which was a Matter that came on upon a Rule to shew Cause, why an Attachment should not go against an Officer for an Abuse in executing the Process of the Court, Mr. Strange said, he apprehended the Rule was different between Attachments and Informations in this Respect; for that if the Person, against whom the Complaint was made, did but deny the Charge alledged against him, the Court would discharge the Rule in Case of an Attachment, though he agreed they would not in Case of an Information. The Court there did not deny this; but said, when they pronounced the Rule, at the Time the Affidavits were read, on which the Complaint was founded, they ordered that this Person should answer the Matters of the Affidavit, with an Intention, that on shewing Cause

How far the Court will direct, that Overseers of the Poor shall answer the Matters of an Affidavit.

Cause they might grant an Attachment or Information at their Discretion. Accordingly the Rule was ordered to be drawn up so; and that the Person complained of should shew Cause on Thursday.

The King and Paxton.

Vide ante

THIS Matter being moved again, a Case out of 3 Keb. 603. was cited, to shew that Informations are local, as well as Indictments; and it was said, that there are two or three more Cases, wherein this is adjudged. Accordingly the Court discharged the Rule, unless Cause on Thursday.

Ely and Morant.

How far the Court will quash a Scire facias against Bail.

MR. Robinson moved, that Proceedings against Bail might be stayed, and that the second Scire facias might be quashed, for its being returnable Die Lunæ prox' post Mens' Sti. Michaelis, which was the Feast of all Saints; and consequently no Law-day. Accordingly the Court referred the Irregularity of this Matter to the Master.

The King and Empson.

Vide ante.

MR. Fazakerly and M. Agar both now argued this Matter for the Defendant. They said, there were three Convictions returned upon the Certiorari; the first, whereby the Defendant was fined 60l. the second, whereby he had a Day given him to appear and pay it on; the third, whereby the Fine was created. To the first of these Convictions, they said, the Form of it was, Cum ad Session' tenth' apud Howden octavo die Novembris Anno tertio Domini Regis nunc; Cumq; ad hanc Session' ordinatum est in his Anglicanis verbis sequentibus. It is ordered, that Empson, the Defendant, should appear and answer certain Rasures contained in a certain Book of Pains, which was delivered to him when Foreman of a Jury for Howdenshire. And whereas he the said Empson did appear, and it being asked him, is this Book of Pains, delivered you when you were Foreman of the Jury for Howdenshire, the same Book; was it then in the same Condition it is now? He said Empson did refuse to answer upon Oath; it is ordered, that he should be fined 60l. And the fourth Day of April in the same Year was given him to appear and pay the Fine on. The Exceptions taken by them to this Order was, first that this Order is only by way of Recital; secondly, that it does not appear the Book in Question related to them; thirdly, that Howdenshire was not laid to be within their Jurisdiction; fourthly, that the Rasures did not appear to be in material Places; fifthly, that they had no Authority to administer such Oath, it tending to accuse himself; and lastly, that it was not set forth with sufficient Certainty, that the Oath was ever tendered. M. Reeves was

Counsel

Counsel of the other Side; but desired Time to answer these Exceptions; accordingly the Matter was ordered to stand over. Vide post.

Darby and Pool.

IN Debt on Bond for 181. the Defendant demanded Oyer of the Condition, set forth the Statute of Hen. 6. and farther pleaded, that a Plaint was laid in the Palace-Court in Southwark against one Bridge for 201. that thereupon Process issued to one Birley, a Clerger and Minister of the Court, who did arrest the said Bridge, apud Westmonaster' infra Jurisdiction' Cur' prædict'; and accordingly took the said Bond of her in the Name of the Plaintiff, for her Appearance for Case and Favour. The Plaintiff replies, that the Plaintiff was Under-Marshal and Keeper of the Prison of the said Palace-Court, erected by Letters Patent in the Reign of King Charles 2. vigore & secundum formam Statut' infra Westmonaster' prædict'; and that the Bond was made to the Plaintiff, absque hoc, that Birley took the Bond in the Name of the Plaintiff, in the Manner mentioned by the Defendant. Upon this, Issue was joined, and a Verdict found for the Plaintiff. Mr. Filmer now moved in Arrest of Judgment. The Objection, that he relied upon was, that the Bond does not appear to have been given to the Plaintiff in the Name of his Office. He said, he did agree, that the Defendant did not demand Oyer. But then the Plaintiff ought to have set it forth in his Replication; and prayed that the Bond might be introlled. To which Purpose he cited Carthew 301. Lutw. 680. He likewise observed, that the Plaint set forth in the Plea is for a greater Cause of Action, than that Sum mentioned in the Bond; and therefore the Causes of Action could not be intended to be the same. To this Serjeant Darnel answered, that the Palace-Court appears by the Record to have been erected long since the Statute of Hen. 6. and therefore he apprehended, that that Statute could not extend to the Case in Question. To this Purpose he cited the Opinion of the eleven Judges against one in Salk. 373. that the Statute of 21 Jac. requiring Informations to be brought in the proper County where the Offence arises, does not extend to Offences, for which Informations lie by subsequent Acts of Parliament. Besides, he said, he apprehended, that the Bond on which the present Action was brought, does not appear to have been a Bail-Bond; and if so, there was no Colour for either of these Exceptions. Now as to that Mr. Benney, who was of the same Side, spoke more particularly; and said, that wherever a Defendant may plead, that the Bond was taken by Duress, he submitted, that the Bond should not be considered, as taken by Virtue of the Statute. And he said, he took it, that wherever it did not appear, that the Bond was taken within the Officer's Jurisdiction, such Bond may be pleaded to have been taken by Duress. For this Purpose he cited 3 Cro. 745. 1 Cro. 309. Dyer 120. Now in the present Case he submitted it, that the Bond did not appear to have been taken within the Jurisdiction of the Court.

What shall
be said to be
a good Bail-
Bond.

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He did agree, that the Defendant had alledged in his Plea, that Darby took this Bond at Westminster within the Jurisdiction of the Court. But that Fact is found against him by the Verdict. And nothing of this is admitted in the Plaintiff's Replication. It is only admitted there, that the Bond was given *infra* Westmonaster' prædict'. But one Part of Westminster may be within the Jurisdiction, and one Part out of it. And for this Purpose he cited the Case of Darby and Reydock. The Chief Justice said, that he took it clear; that the Westmonaster' prædict' in the Plaintiff's Replication, and the Westmonaster' *infra* Jurisdiction' Cur' alledged in the Plea, must be understood to be the same Place. However the Court thought this might be a proper Matter to be farther considered of. *Vide post.*

Lady Faulconberg against Legh and others.

How far an Answer to a Bill of Discovery shall be said to be sufficient.

Scac. **T**HIS was a Matter that came on upon an Exception to the Answer, which the Defendant Legh put in to a Cross Bill that was filed against him, requiring him to discover amongst other Things, what Title he had to the Impropriation, by Virtue of which he brought his Original Bill against the present Plaintiff, demanding Cithes in kind of her. The Chief Baron objected, that we had no Right to controvert the Title of the present Defendant, in as much as we did not set up any Title against him. And if it should be admitted, that he was obliged to set forth a Title, possibly a small Title would be sufficient; for he had known forty Years Possession to serve for a Title in many Cases. To this I answered, that I did agree, if the Plaintiff's was an Original Bill, he would have had no Right to have called in Question the Defendant's Title; but I did submit it, as the present Defendant filed his Bill first against the Plaintiff, he had a Right to defend herself in the best Manner she was able; and therefore might well insist upon an Answer to the present Question. I said farther, that the present Defendant's Title was to an Impropriation; which Title, I submitted it, could only be by Matter of Record. Because till the Statute for dissolving Monasteries was made, a Layman was not capable of Cithes; then indeed the Statute allowed, that Grants should be made of them by Letters Patent to the Laity. For which Reason I apprehended, that no other Title, but the Record of the Letters Patent, would be allowed of. However the Court over-ruled me, and would not let me enter into the Merits of the Exception.

The Sword-Blade Company *and* Dempsey.

ON a Writ of Error upon a Judgment in the Court of Erchequer in Ireland, given in an Ejectment, that was brought for the Moiety of the Mill and Territory of Kilcommore, and of the Moiety of the Mill and Territory of Kanymore in King's County, upon the Demise of Jane Mackgawley; Mr. Robinson said, that the Fact stated upon the Record was, that a Trial at Bar was had upon this Ejectment in the Court below; and that the Title proved in Evidence for the Plaintiff there was, as one of the Sisters and Coheirs of Thomas Leicester, who died seised in Fee of these two Townships and Territories inter alia, and left the Plaintiff Jane and one Mary Nugent his Coheirs at the Time of his Death; which said Jane and Mary entred into the said Premises in 1694, and thereof made Partition; that the Moiety of these Mills and Territories now in Question was allotted to the Plaintiff; whereupon she entered and was possess'd, till the Defendants ejected her. The Record then sets forth, that the Defendants went into their Title; and they first produced in Evidence certain Inquisitions taken in the several Counties in Ireland at the Time of the late Wars, of all such Rebels as were slain there on Account of their Fortunes and Estates; which Inquisitions were made in Pursuance of certain Commissions issued out for that Purpose. They then produced an Act, passed in the Parliament of Ireland 9 W. 3. by which it was provided, that all Papists or reputed Papists slain in open Rebellion in that Kingdom, and found so by any Inquisition taken within two Years then before, should be considered as attainted of High Treason to all Purposes whatsoever; and that thereupon their Lands, Tenements, Goods and Chattels should be vested in the Crown. They farther gave in Evidence an Act passed in the Parliament of England 11 & 12 W. 3. 2. by which it is provided, that the Lands, Tenements, Goods and Chattels of all such Persons found by Inquisition to have been slain in actual Rebellion within the Kingdom of Ireland since the 13th of February 1688, should be vested in certain Trustees to be sold, in order that the Money arising from such Sale might be applied to the Use of the Publick. It was then proved, that Thomas Leicester was found by Inquisition to have been slain in open Rebellion between the said 13th of Feb. and the Time of making this Act. That the Defendants purchased the Lands in Question of the said Trustees on the 19th of June 1703. The Record then farther sets forth, that the Plaintiff below offered to produce Evidence, that Thomas Leicester was no Papist nor reputed Papist. And in order to be let into this Evidence, it was proved, that a former Ejectment had been brought by The Sword-Blade Company against the said Jane Mackgawley, of the Lands in Question; upon that Trial the same Sort of Evidence was produced for the then Plaintiffs; and notwithstanding the Inquisitions and all this Proceeding it was insisted upon, that the Plaintiffs should prove, that Thomas Leicester

was a Papist or a reputed Papist, and accordingly the then Plaintiffs were allowed to give Parol Evidence of that Fact. The then Defendant upon that signed a Bill of Exceptions. A Writ of Error was brought in the Erchequer Chamber in Ireland upon that Judgment, and the Judgment of the Court of Erchequer, which was given for the then Plaintiffs reversed. Another Writ of Error was upon this brought into the House of Lords, and the Judgment of Reversal was reversed itself, and the Judgment of the Court of Erchequer affirmed. The Record set forth, that accordingly this Parol Evidence, that Thomas Leicester was no Papist, nor reputed Papist, was allowed by the Barons in the present Case. And thereupon the Counsel for the Defendant below insisted upon a Bill of Exceptions, which was accordingly signed. And now the whole Fact appears upon this Bill of Exceptions, as returned. And likewise it is set forth by the Record, that the Barons gave Judgment for the Plaintiff. Which Mr. Robinson said, he submitted it, was erroneous. He observed, that it was by no Means clear, that there was any Necessity to prove Thomas Leicester a Papist or reputed Papist. He did agree, that the Irish Act confines itself to such Persons only; but the English Act speaks of all Persons in general, that were found by Inquisition to have been slain in actual Rebellion between 13th of Feb. 1688, and the Time of passing that Act. But if that Question was to be entered into, whether Papist or not Papist, he submitted it, that Parol Evidence of that Sort ought not to be admitted; especially after so great a Length of Time. He said, in not one of the Forms of these Inquisitions was it ever mentioned, that the Party slain in Rebellion was a Papist or reputed Papist. And therefore from the Fact's not being mentioned in the Inquisition no Argument could be drawn, that the Fact was not so. He said likewise, that there was another English Act passed 6 Ann. 34. by which it is provided, that all Persons, having any Right or Title to the Lands in Ireland purchased by the Sword-Blade Company, should enter their Claims in some Court of Record in Ireland, within two Years to be computed from the 24th of June then next following. He said, Patrick Mackgawley, Husband of the said Jane, did enter his Claim for her within the two Years; but in that Claim never set up this for a Title, that Thomas Leicester was not a Papist nor reputed a Papist. And therefore he apprehended the Court would not suffer him to do it now. He said likewise, that he should submit it, that there was a material Fault in the Declaration; for the Plaintiff has brought his Ejectment, amongst other Things, of the Society of a Till or Territory; for which an Ejectment would not lie; and therefore, as there are intire Damages given, the Plaintiff cannot recover. To this Purpose he cited Moor 427. 3 Cro. 186. Rolls Rep. 55. Sid. 259. 3 Keb. 450. Yelv. 117. Salk. 254. Carth. 224. Mr. Bootle on the other Side said, that he was surprised to find it made a Question at this Time, whether it was necessary, that Thomas Leicester should have been a Papist or reputed Papist at the Time of his being slain in this Rebellion, in order to

give the present Plaintiffs a Title to these Lands; for that he was credibly informed, that this was never offered to be disputed in this Ejectment before the Barons, nor in the other Ejectment, that was brought between the same Parties for these very Lands, and wherein the Judgment of the Court of Exchequer was affirmed in the House of Lords, Feb. 9, 1726. He said therefore, that he apprehended the Court would hardly enter into that Question. Then as to the second, he submitted it, that the parol Evidence, even at this Day, was very proper. He said, the Husband of Jane Mackgawley did enter her Claim within the Time prescribed by the Statute of Anne; and therefore it could not be pretended, that the present Ejectment was brought too late. But whatever Claim he then made, that could certainly not conclude her now from alledging a different one. However, if there should be any Doubt, whether this very Claim ought not to have been entered upon Record; and consequently, whether this Parol Evidence shall not be now refused; he said, the present Plaintiffs must be estopped from making this Objection; because it appears by the Record, that they themselves went into this Sort of Evidence in the former Ejectment. Then as to the last Objection, he said, he did believe in former Times the Judges would not allow Ejectments to be brought of Things, which are so uncertain, as a Mill or a Township. But of later Times the Courts have not tied themselves up so strictly. For this Purpose he cited 3 Cro. 465. Sid. 75. 1 Mod. 90. 4 Mod. 145. And in Lit. Rep. 301. it is held in particular, that an Ejectment will lie for the Molety of a Manor; and therefore he thought there would be little Doubt with the Court as to this Objection. And as to the Word Territory, he was informed, that in Ireland that is of the same Signification with a Mill; but if the Court should have any Doubt in that Respect, they would write to the Judges in Ireland, to be informed as to this Matter by Certificate. The Court said, that they believed they should get over this Objection as to the Uncertainty of the Thing for which the Ejectment was brought; but as to the other Matters, they were proper to be farther considered of. *Vide Post.*

Hayes and Warren.

THIS Matter coming on again, Mr. Parker argued for the Plaintiff; he said, he should submit it, that there was no Decalation to prove a Request by the Plaintiff to the Defendant, in Order to support the present Action; and if the Plaintiff could prove a Promise made by the Defendant to pay after the Work, that would be sufficient; for which Purpose he cited Hutt. 84. He said farther, that in the present Case, the Promise to pay is laid to be made on the same Day which the Work was done upon, and therefore this is unquestionably good, by the Authority of Latch 150. The Chief Justice and Judge Page said, the present Action is not for Goods sold and delivered; if it had, it would have been a much more favourable Case for the Plaintiff; because by the Acceptance of the Goods, there seems to be

Vide ante

be an Agreement to pay for 'em. But here the Defendant might be no ways privy to the work done at the Time of the doing it. And therefore they continued to think, that the Plaintiff could hardly recover; however ordered this Matter to stand farther over. Vide post.

The Bishop of Landaff and The King.

What shall be said to be a sufficient setting out of a Presentation in a Quare Impedit.

IN a Writ of Error upon a Judgment in Quare Impedit, given in the Grand Sessions of Glamorgan, the Declaration set forth, that Queen Anne was seised of the Advowson in Gross of the Church of St. Andrew in the County of Glamorgan, in Fee, in Right of her Crown, and that the Church became vacant in 1706. by means of Dr. Tylor, the then Incumbent, being made Bishop of Landaff, by which the Arch-Bishop of Canterbury granted by his Letters of Dispensation, that Dr. Tylor, the then elected Bishop of Landaff, might retinere, gaudere, habere & in Commendam tenere, the same Church during his Life, and so long as he should be Bishop of that Diocese, which Letters of Dispensation were founded upon a Motion, setting forth the Smallness of the Bishoprick. The Declaration farther set forth, that the Queen by her Letters Patent confirmed his Dispensation, by which the said Dr. Tylor did enjoy the said Church during his Life; that Dr. Tylor died in the Time of the late King, by which the Right of presenting to the said Church was in his late Majesty, and from him descended to the present King; that the present King presented to this Church, but that the Lord Brookes disturbed him, by Reason of which the King brought the present Action. The Bishop claimed nothing but as ordinary. The Lord Brookes pleaded, that he was seised of a Society of the Manor in Fee, to which this Advowson was appendant, by means whereof he had a Right to present every other Turn, absq; hoc, that the late Queen was; and upon that, Issue was joined; and the Jury found a Verdict for the King, viz. that the late Queen was seised of the Advowson ut de uno grosso per se in Right of the Crown. Serjeant Hawkins now argued for the Plaintiff in Error, and submitted it, that upon this Record the King ought not to have had judgment; because he has laid no Presentment in his Declaration, nor any Thing equivalent to it. That it was necessary for the King to lay a Presentment, as well as a common Person, he said, was evident from the Authority of 14 H. 4. 6. Vau. 7, 53. Skin. 651, 657. And he submitted it, that the Commendam set forth, could by no means be thought equivalent to a Presentation; because it is a Commendam retinere, and not a Commendam accipere. The Court declared their present Thoughts to be, that if any Thing was set out upon this Record equivalent to a Presentation, that would be sufficient, as well as if a Presentation itself was. They said the Record sets out, that the Church was void at the Time this Commendam was made. There are Words in this Commendam, amounting to an accipere; as habere, gaudere & tenere. The Objection then arises from the Word retinere; but they observed it was frequent in Construction, when some

Words

Words will make an Instrument good, and others void, to reject those that would make it void, and to keep those that will make it good. However, they thought this a Matter proper to be farther considered of; so ordered it to stand over. Vide Post.

Skinner and Rebow.

IN an Action brought by Assignees under a Commission of Bankruptcy against the Executor of Sir Isaac Rebow, the Plaintiffs declared, that the Defendant promised to pay them, but did not; by means of which they brought this Action. The Defendant pleaded, that he never made such Promise to the Bankrupt; and upon that the Plaintiff demurred. Mr. Denison now argued for the Defendant, and said, that he submitted it, the old Right of the Bankrupt was in the Assignees, and no new Right accrued to them; and for this Purpose cited the Case of Gray and Mendish, 9 Geo. 1. where the Court made use of this very Expression; the Consequence of which, he apprehended, was, that though the Plaintiffs have made Use of an Expression in the Declaration, that the Defendant promised to pay them; yet that must be understood of the old Promise made to the Bankrupt; for which Reason he submitted it, that the Plea of the Defendant, denying that Promise, was right; and if the Plaintiffs had intended by their Declaration, that there was a new Promise, they ought to have replied that. But the Court said, that if the Defendant had by his Plea denied the very Words of the Declaration in this Point, the Plaintiffs would have been bound at the Trial to have proved a Promise actually made to themselves. They took this to be exactly like the Case of an Executor; accordingly gave Judgment for the Plaintiff. Vide Post.

When an Action is brought by Assignees under a Commission of Bankruptcy, what shall not be good pleading in such Action.

The King and Theed.

MR. Marsh now argued for the Defendant; but insisted singly on that Exception for want of the Evidence being set forth, on which the Defendant was convicted. To this Purpose he cited the Cases of The Queen and Green, Hill. 1713. The Queen and Brown, Pasch. 12 Ann. The Queen and Randon the same Term, The King and Step, Trin. 11 Geo. 1. And The King and Tuck, Pasch. 11. in that Reign. All which, he said, were directly in Point. Mr. Reeves on the other Side, cited a Case in Salk. 369. where a Conviction is expressly held to be good, without setting out the Evidence. Besides, he said, he apprehended, that the Evidence was sufficiently set out in the present Case; for the Words in the Statute on which he is convicted, are, That the Party shall not be convicted but by his own Confession, or the Oath of one or more credible Witnesses. Now he observed, that it was expressly set out on this Record, that the Party was summoned, and appeared, and pleaded, that he was not guilty. Therefore it evidently appeared upon this Conviction, that the

Vide ante 16.

Party could only be convicted by at least the Testimony of one Witness; and the Words in the Conviction are, the same being fully and duly proved. The Court said, that the Case cited out of Salk. they believed was one of the first Cases wherein this Exception was ever taken; and there they did agree it was over-ruled; but since that Case it has constantly been allowed. And as to what was said, that the Evidence was sufficiently set out in this Case, they took it to be otherwise. And Judge Lee said, he remembered a Case, which was that of The King and Baker, Trin. 6 Geo. 1. where the Words in the Conviction were, that the Witness made Oath de veritate præmissorum, and yet that was held not to be sufficient; accordingly the Court quashed the Conviction in the present Case.

The King and Nelson.

Vide ante 44.

THIS Matter being now set down in the Paper, the Court said, that they took this Case to be exactly the same with that of Sir Edmund Elwell; and therefore were for quashing the Conviction directly. However, as Mr. Fazacherley was retained to support it, but could not be present, they only quashed it, nisi.

Anonymus.

The Construction of a Charter relating to the Persons who are to chuse a Member of a Corporation.

MR. Kettleby moved for an Information in the Nature of a Quo Warranto against one Harris, to know by what Authority he claim'd to exercise the Office of Capital Burgeses in the Borough of New Radnor. He said the Charter required that the Capital Burgeses should be chose by the Burgeses, or the major Part of them. Now he submitted it, that the Construction of this Charter must be, that the Majority of the whole Number of the Electors must be present at least at an Election. Thirty-one was the Number of the Electors appointed by the Charter; but he had an Affidavit to produce, that but nine of them were present; accordingly the Court made a Rule to shew Cause.

White and Love.

The Certainty required in an Affidavit to change a Venue.

MR Marsh moved to discharge a Rule for changing a Venue from London to Norfolk, for that the Affidavit, on which it was obtained, was only, that the Promise arose there and not elsewhere, without saying in general, that the Cause of Action did; accordingly it was discharged.

Meed and Gibbons.

IN Debt on Bond, brought by two surviving Executors, the Defendant demurred specially to the Declaration; and the principal Cause relied upon was, that the Plaintiffs had only alledged, that the Money had not been paid to the Testator in his Life-time, nor to them, or one of them, since his Decease. Mr. Agar now argued, that this Declaration was not certain enough, so as the Plaintiffs could recover upon it; because, notwithstanding any Matter which they have alledged, the Money might have been paid to the Executor, that is now dead. Serjeant Baynes on the other Side answered, that if it had, the Money would in Judgment of Law have been paid to the surviving Executors, as well as to the Executor deceased; for a Payment to one is a Payment to all. The Court thought this a Matter proper to be farther considered of. But a few Days after over-ruled the Demurrer; and gave Judgment for the Plaintiff.

The Certainty required in a Declaration by an Executor.

Anonymus.

MR. Strange moved for a Rule to shew Cause, why some Orders should not be quashed, that were made at the Quarter-Sessions for the County of Surrey. He said, they were founded upon a Statute made 4 Geo. 1. for repairing the Roads leading from the City of London to the Town of East Greenstead in that County. That Statute provides, that there shall be a Turnpike erected upon some Part of the Road between the City of London and that Town, and that there shall be Trustees appointed for that Purpose. The Act farther provides, that the Justices of the Quarter-Sessions for the County of Surrey, shall have a Power to nominate two Persons to inspect the said Roads, in Relation to the Condition that they shall be in from Time to Time, and likewise to inquire into the Duties and Tolls arising from the Turnpike. The Justices at their Sessions accordingly did take into their Consideration this Matter, and made an Order in the first place, that two Persons then present, should inspect these Roads. At another Time, that these Persons should make their Report. At a third Time, they made an Order, reciting, that it had appeared by the Report made by these two Persons, that the Turnpike was erected within the Town of Kingston; whereas the Act gave the Trustees only a Power to erect one between the City of London and the Town of Kingston; so that the Trustees had exceeded their Authority; and thereupon they ordered, that this Turnpike should be abated. At a fourth Time they made an Order that the Sheriff should abate it. And at a fifth Time, finding that the Sheriff had not done it, they made an Order that the Sheriff should peremptorily do it. He said, he apprehended, that two plain Exceptions might be taken to these Orders; one, that the Persons appointed to take the View, had no Power to make any Inquiry relating to the Situation of the

What shall be said to be a good Order or not, relating to a Turnpike.

the Turnpike; the other, that the Sessions had no Power to order the Sheriff to abate it. Accordingly a Rule was made to shew Cause. Vide post.

Roffey and Hanbury.

How far the Court will not allow an Amendment of a Declaration in an Ejectment.

MR. Harper moved for Liberty to amend a Declaration in an Ejectment by the Bill upon the File, by altering the Day of the Demise to the first of June. He said the Tenant in Possession has entered into the common Rule; by which this Ejectment ceases to be a fictitious Suit, and is become a real one. For which Reason he submitted it, that this Ejectment now is upon the same footing with all other Actions. The Court said, that they have known the Distinction between the Ejectments and other Suits often taken in this respect. Because the Tenant only appears to the Demise as laid. For which Reason, they said, he must bring a new Ejectment.

The King and St. Margaret's Westminster.

How far a Person gains a Settlement by renting a Tenement.

Serjeant Corbet moved to quash an Order of Sessions, allowing an Appeal from two Justices, for the Removal of one Elizabeth Conyers from the Parish of St. Margaret's to the Parish of Ludgate. The Fact specially stated was, that James Conyers, the Father of the said Elizabeth, rented a House in Ludgate Parish of 25 l. per Ann. and paid to the Rates of Church and Poor, but that he was a Prisoner in the Fleet at the Time he did so, and that Elizabeth had gained no Settlement for herself. Upon which the Sessions adjudged, that he gained no Settlement by this. But the Serjeant submitted it, that he did. Accordingly the Court made a Rule to shew Cause. And the next Term made it absolute.

Leel and Smith.

How far the Court stays Proceedings in an Action upon a Bail-Bond.

MR. Fazakerley moved for Liberty to proceed in an Action upon a Bail-Bond. He said the Fact was, that the Defendant owed the Plaintiff 40 l. but before any Action commenced for this Money the Defendant agreed to pay the Plaintiff 5 l. in Money, and 20 l. by a Bill of Exchange; and so no Proceedings were to be had. The Bill of Exchange was not paid; and upon this the Plaintiff brought his Action for the whole Money; and took an Assignment of the Bail-Bond. The Defendant summoned the Plaintiff before Judge Probyn, to shew Cause, why Proceedings upon the Bail-Bond should not be staid. The Defendant offered there to pay him the whole Sum demanded; and the only Dispute between them was about Costs. Upon this the Judge ordered, that Proceedings on the Bail-Bond should be staid till farther Order, in hopes that the Parties would agree this Affair within a Day or two amongst themselves. However they did not, and now the De-

fendant

Defendant offers indeed to pay the Costs. But he submitted it, the Plaintiff had a Right to proceed. He said this was a bare Agreement between the Parties without a Satisfaction, and therefore he apprehended the Defendant would not be at all benefited by it, if he should plead in Bar. And so, he said, he remembered, that a stated Account and a Note for the Balance was held to be no Satisfaction in the Court of Exchequer. He said farther, that he apprehended this Court would never stay Proceedings in a summary Way upon such an Agreement, when the Agreement was made before the Suit begun. But the Court said, that the Parties disagreeing before the Judge in nothing but the Costs, they thought was a sufficient Agreement pending the Suit for this Court to lay hold of. Accordingly they staid the Proceedings upon the Defendant's offering to pay Principal and Costs.

Spinmore and Bowler.

THIS Matter now coming on upon the Master's Report, Serjeant Cummins said, that he submitted it, Persons escaping who are brought up out of inferior Jurisdictions by Habeas Corpus, cannot be taken up by Escape Warrants within the Statute of 1 Ann. 6. And therefore upon that Account, if there was no other, he apprehended, the Defendant ought to be discharged upon common Bail. Mr. Strange said, that this Point, which was now made, was not thought of in the former Motion. And therefore he desired Time to look into the Act; which the Court granted.

Vide ante 33.

Vide post.

The King and Heber.

MR. Strange had moved at the Beginning of the Term for an Information against the Defendant, who was a Justice of Peace, for convicting a Man upon one of the Game Acts without giving him any Summons to hear what he could say in Defence of himself. But the Court refused the Motion then; because the Convictions were not returned. Mr. Strange now moved this Matter again, and said they were returned; and the Defendant has been so hardy, as to return, that he was summoned. Upon which he moved for a Rule to shew Cause; and the Court granted it.

How far the Court will grant an Information against a Person for making an illegal Conviction.

The Governor and Company of London-Assurance and
Dickenson.

When an Action is brought against a Bailiff of a Liberty, what shall be said to be a good Declaration in such Action.

UPON a Writ of Error on a Judgment in the Common Pleas in an Action upon the Case against the Defendant as Bailiff of the Liberty of Stepney, M^r. Robinson said, that the Declaration set forth, that a special Capias was directed to the Sheriff of Middlesex, and that the Defendant had the Return of Warrants within this Bailiwick; that he had the Return of this particular Writ, and accordingly the Sheriff made out his Warrant to him ut caperet this Person, ita quod haberet befoze the Justices of the Common Pleas on such a Day; that the Defendant accordingly did arrest this Man; that he escaped from him, and yet he made a false Return, that he could not be found, to the Plaintiff's Damage, &c. To this Declaration M^r. Robinson took several Exceptions. He said, in the first place, that here were two Causes of Action joined together in one Suit, viz. an Escape and a False Return; which were so different in their Natures, that he apprehended by Law, they could not be joined. In the next place he submitted it, that it was necessary to be laid in this Declaration, that the Defendant had the Return of the Writs; and for this Purpose he cited a Precedent out of Ven. 399. But in the present Declaration, it is only laid, that he had the Return of Warrants, which every Constable has. And in the last place he observed, that by Law the Sheriff is to have the Body of the Party arrested on the Return of the Writ; but in the present Declaration, it is laid, that the Defendant was to have his Body there. To the first of these Exceptions the Court said, that this was only an Action for a false Return; and the Matter relating to the Escape is only by way of Aggravation. To the second the Chief Justice did agree, if the Action had been brought by the Defendant, it would have been necessary for him to have laid a Title to the Return of Writs; but in the present Case it is enough for the Plaintiffs to shew, that he ought to return the Writ in Question; and that they have done; for the Fact is expressly laid so in the Declaration. Then as to the last Exception, the Court said, that they would understand the Declaration to mean, that the Sheriff should have the Body at the Day, and not the Defendant. For which Reasons they affirmed the Judgment.

Matthews and Kingsford.

How far the Court will supersede an Escape Warrant.

MR. Reeves moved, that an Escape-Warrant might be superseded, and that the Defendant might be discharged out of Custody. He said, that the Warrant was made out so long ago as in the Year 1725. and the Defendant was taken upon it last October; and that too by a common Bailiff that executed

cuted it, without any other Authority whatsoever. But he observed, that in the Case of Web and Cutler, Mich. 2 Geo. 1. an Escape-Warrant, made out in the late Queen's Time, was held to be of no Force after her Demise. For which Reason the present Writ likewise, that appears to have been made out in the Time of Geo. 1. must have lost its Force likewise by his Demise. He said likewise, that in the Case of Year and Gour, Hil. 10 Ann. it was held, that a common Bailiff could not execute such a Warrant by Virtue of the general Words in it without a particular Authority. The Chief Justice said likewise, that he remembered an Escape-Warrant was superseded, that was executed after the Time that the Judge was out of his Office, that granted it. Accordingly the Court made a Rule, that the Writ should be superseded, and the Defendant discharged, unless Cause to shew.

Cortesses and Munes.

MR. Filmer moved, that the Defendant's Bail might be discharged, and the Process, on which he was taken, set aside, for not being marked with the Name of the Attorney, as the late Act requires, which was made 2 Geo. 2. He did agree that it was marked with the Name of the Person, whom the Attorney employed to manage this Cause for him. But Judge Lee said, that this Person could at most be considered only as a Solicitor in the Cause. And the Act requires, that the Writ should be marked with the Name of the Attorney and Solicitor. Accordingly the Court made a Rule to shew Cause. Vide post.

How far a Writ shall not be said to be duly marked with the Name of the Plaintiff's Attorney, according to the Intent of the Statute of Geo. 2.

Burrey and Perrey.

IN an Action brought by the Plaintiff for Words, they were laid to be spoke of him in his Trade as a Blacksmith; and were to this Purpose, Burrey put on a Lock for Mrs. Fowler, and he put it on so, that he could pull out the Screws, and he broke into the House. The Plaintiff laid likewise in his Declaration special Damage, which he suffered by the Speaking these Words. And had a Verdict with 5 l. Damages. Serjeant Belfield now moved that the Plaintiff might have full Costs. He said the Words were not Actionable in themselves, and therefore the Special Damage is the Fit of the Action. For which Reason he submitted it, his Application was proper by the Authority of Salk. 206. Accordingly the Court made a Rule to shew Cause. Vide post.

How far Words which are spoken of a Tradesman shall be said to be actionable, or not.

The

The King *and* Burford.

What kind of
Indiſaments
the Court
will quash.

MR. Reeves moved on Behalf of the Prosecutor to quash an Indiſament of Perjury, for there being a Miſtake in it in laying the Faſt. The Chief Juſtice at firſt doubted, whether it was uſual to quash Indiſaments for ſo great Offences. But Mr. Abney ſaid, he remembered, the ſame was done in the Caſe of The King and Rouse. And Judge Lee ſaid, that he remembered the ſame in the Caſe of The King and The Inhabitants of Aynelworth. That was an Indiſament for not repairing a Highway, which the Court would not have quashed, but on the Behalf of the Prosecutor. Accordingly the Court did it in the preſent Caſe.

The King *and* Philips and others.

How far ſe-
veral Perſons
cannot be
jointly in-
diſed for
one and the
ſame Offence

THIS was an Indiſament for Perjury, which charged the Defendants, who were ſix in Number, with Swearing Faſly againſt one Willis, who had been indiſed for Felony. And after the Indiſament had charged them with committing this Offence jointly, the Indiſament charged them ſeparately with it. Mr. Reeves ſaid, that the Defendants had moved in Arreſt of Judgment, upon an Exception taken, that a joint Indiſament would not lie againſt them; but he ſubmitted it, that the Indiſament might be well maintained. He ſaid, the Perjury was committed by all of them againſt one and the ſame Perſon, at one and the ſame Time, and upon one and the ſame Occaſion. On this Indiſament they are all of them found Guilty; and therefore if the Indiſament had even gone no farther, than to have been a joint Indiſament againſt all; he apprehended the Court might well pronounce Judgment againſt the Defendants upon it. But he obſerved, that there was ſufficient Foundation for ſupporting the preſent Exception; becauſe they are indiſed ſeparately over again. Mary Philips is expreſſly ſo; Elizabeth Heaton and another are indiſed, that they & uterque eorum committed this Offence; and ſo the other three are indiſed, that they & quilibet eorum did the ſame. Then by Way of Authority to ſhew, that this Indiſament would have been good, if it had even went no farther, than the firſt Part of it, he cited the Caſe of The Queen and Maſhal, Trin. 10 Ann. There two were indiſed for receiving ſtolen Goods; one was acquitted; the other convicted; a Motion in Arreſt of Judgment made, becauſe the Indiſament did not ſay, that they & quilibet eorum committed this Offence; but the Court there over-ruled this Exception. So he ſaid ſeveral may be jointly indiſed for Extortion, as is the Caſe in Salk. 382. The ſame is of Maintenance, Ven. 302. So two have been jointly indiſed for ſpeaking blaſphemous Words; and ſuch Indiſament was held good in Stiles 312. And there Chief Juſtice Rolles declared, that the ſame was of an Indiſament of Perjury. Then by Way of Authority to ſhew, that at leaſt one Indiſament might

might include these Offenders, by charging them separately with this Offence; he said, it is allowed in Palmer 369. and in 2 Roll's Rep. 345. that four Persons may be included in one Indictment for creating four several Inns. And in order to shew, that the Words *uterque eorum & quilibet eorum* does amount to a separate Charge, he said, the Word *separaliter* is allowed to amount to one in the same Books immediately before cited. Mr. Hayward on the same Side said, that in Keb. 585. two were jointly indicted for Perjury, and on Exception taken to the Indictment for this Reason, the Indictment was held good. Mr. Fazakerly and Mr. Strange argued on the other Side, and said, that they did agree, wherever Misdemeanours are in their Nature joint, Persons joining in the Commission of such Misdemeanours may be punished by a joint Indictment. And therefore the Cases of Trespasses, Extortion, Maintenance and such like, they well allowed. But wherever Misdemeanours are in their Nature several, the Persons committing such Misdemeanours at one and the same Time can never be indicted jointly for the committing them. For this Purpose they cited the Case of The Queen and Hodgson, Trin. 6 Ann. There two were indicted for being common Scolds. Mr. Whitaker moved to quash the Indictment; because these Offences are in their Nature several. The Court allowed, that the Indictment was bad for this Reason; but refused to quash it; because that was in the Nature of an Indictment for a Nuisance. So in the Case of The King and Wilson, Pasch 11 Geo. 1. an Exception was taken to the Indictment for being joint against two for exercising a Trade against the Statute of 5 Eliz. and the Indictment quashed for that Reason. To the like Purpose was cited the Case of The King and Clendon, 6 Mod. 210. And in Palmer 535. an Indictment of Perjury against two was held bad upon this very Exception. Then as to the other Answer which was made, that the present Defendants are indicted separately for this Offence; they said, if this Answer was sufficient, it would equally hold, that such Indictment would have been good, if one Misdemeanour had been a Perjury and the other a Forgery. Which, they believed, was never yet imagined. The Court declared their Opinions to be, that the Offence of Perjury was of such a Nature, as it was impossible two could be jointly indicted for it; and said, they were well satisfied that the Distinction taken by the Defendant's Counsel between some Misdemeanours and others, was well supported by the Law. And as to the Case cited out of Keb. 585. the Chief Justice said, the same is afterwards stated in 635. and he took it, the Judgment was arrested upon the Exception taken in 585. and not for the Reason given in 635, for that can hardly be credited. Then as to the other Point, the Court said, they took it, the Law was certain, that separate Offences cannot be included in one Indictment. Judge Probyn said, that he should think it a dangerous Thing to the Liberty of the Subject ever to admit of this. For if it should, one Defendant might possibly be affected by the Evidence given against the other; whereas the Law requires, that every Defendant should be convicted or discharged singly upon the proper Evidence given against him. Accordingly the Court arrested the Judgment.

The King and Rose.

How far the
Court will
quash a Co-
roner's In-
quest.

MR. Reeves and M^r. Verney moved to quash an Inquisition taken by the Coroner of Kent, upon two Exceptions; one, for Matter appearing upon the Inquisition; the other, for Matter appearing by Affidavits out of it. The Case stated upon the Inquisition was, that one Stone was driving a Waggon down a Hill, that the Horses began to run very violently, upon which the Waggoner leaped out of the Waggon, and thereby one of the Wheels went over him and killed him; and so the Inquisition finds, that that Wheel moved to his Death. The Counsel upon this observed, that this was a false Finding in Judgment of Law upon the Face of the Inquisition; for undoubtedly the whole Waggon, and all the Horses in it, moved to his Death; and the Lord of the Manor was intitled to them, as a Forefeiture. But they said besides, that they had Affidavits from six of the Jurymen, that the Coroner directed them to find, that the Wheel only moved to his Death, and in his Charge told them, that the Law was so; and if he had not informed them so, they should have given in their Verdict otherwise. The Court said, that if this Matter stood singly upon what is found by the Inquisition, they should have clearly thought, that this Court could do nothing in it; because the Jury are the only Judges of what moved to the Party's Death or not. And so Judge Page said, he remembered, the Court was of that Opinion in the Case of *The King and Clark*. Then as to the other Matter, they were in Doubt, whether they could go out of the Inquisition in this Case. Judge Page said, in case a Judge of Assize misdirects a Jury, he thought there was no way to come at that, but by a Bill of Exceptions. However M^r. Verney said, that he had known Cases, where it has been held, that the Court will grant a new Trial in such Case. And M^r. Reeves said, that he was satisfied, he could find Authority, to shew, that the Court has set aside these Inquisitions upon Affidavits. Accordingly they made a Rule to shew Cause. Vide post.

Williams and Seagrave.

How far the
Court will
order a Note
to be deli-
vered up.

ON Rule to shew Cause, why the Plaintiff should not deliver up a Note to one Avery, which Note Avery had paid as one of the Indorsors. The Chief Justice said, this was proved to be a forged Note, in the Court of Exchequer, which M^r. Strange agreed, but submitted it, that Avery might notwithstanding bring an Action upon it against the other Indorsors. The Court allowed this, and accordingly made the Rule absolute.

Anonymus.

MR. Wirley had obtained a Mandamus sometime ago for the making a new Rate for the Relief of the Poor in the Parish of Utoxeter; and had likewise obtained a Certiorari for the bringing up all Orders relating to this Parish; but the Justices had not sent up this Rate with it. For which Reason he moved now for a Certiorari to bring up this Rate. The Court said, this was not a Motion of course for a Certiorari to remove a Rate. However made a Rule to shew Cause. Vide post.

How far a
Certiorari
will lie to re-
move a Poors
Rate.

Anonymus.

A Woman having been brought up by Habeas Corpus, charged with Petit Treason on a Suspicion of poisoning her husband; Serjeant Darnel moved, that she might be bailed. He said, that at present there was only an Inquisition found against her before the Coroner, and no Indictment. He said likewise, that there were only Circumstances laid before the Jury of this supposed Fact; and he had Affidavits to produce directly denying them. The Counsel of the other Side said, that a Fact of this Nature can only be traced out by Circumstances; but that those Circumstances appeared so strong to the Coroner's Inquest, that every one of the Jury (and they were Twenty-three in Number) brought her in Guilty. Judge Lee said, that this Inquisition is in the Nature of a Bill, upon which an Indictment may afterwards be found. And accordingly the Court refused the Motion.

How far the
Court will
not bail a
Person on an
Indictment
for Petit
Treason.

Cortesses and Munes.

MR. Fazakerly came now to shew Cause, and said, that the Fact was, that the Plaintiff had employed one Cuningham as his Attorney, to sue the Defendant in the Common Pleas, which Cuningham accordingly did; but afterwards advised the Plaintiff to discontinue that Action, and bring one in this Court, to prevent the Defendant's being able to keep the Plaintiff out of his Money by Writs of Error, longer than he could do if the Action was in this Court. At the same Time Mr. Cuningham told the Plaintiff, that he was only Attorney in the Common Pleas, and therefore the Plaintiff must employ some Attorney in this Court; accordingly the Plaintiff desired Mr. Cuningham to employ whom he would for him, which Mr. Cuningham did, and afterwards writ the Plaintiff Word that he had employed Mr. Stone for him. Upon this State of the Case Mr. Fazakerly said, he submitted it, that Mr. Stone was to be considered as the Plaintiff's Attorney in this Court, and not Mr. Cuningham. And if so, the Writ was rightly marked with the Name

Vide ante 79.

Name of *Mr. Stone*. The Court was of the same Opinion; accordingly discharged the Rule.

Burrey and Perrey.

Vide ante 79.

M*R.* Hussey came to shew Cause upon this Rule, and said, he submitted it, that the Words were reasonable in this Case; and therefore the Action was to be considered, as founded upon them; and consequently no more Costs than Damages ought to be given, according to the Words and Intent of the Act of Parliament. He said, the Declaration set forth, that the Defendant, knowing the Plaintiff to be a Locksmith, spoke of him the following Words. He put on a Lock for Mrs. Fowler, and at Night broke open the House (*Innuendo Burglariter*) and was likely to have been prosecuted for it, and down'd upon his Knees and beg'd Pardon. He observed, that of late Years, Words had been construed in Actions brought upon them according to the plain and ordinary Meaning of them. And therefore in the Case of Button and Hayward, Hil. 3 Geo. 1. which he himself was Counsel in, in Arrest of Judgment the saying, That the Plaintiff kill'd my Husband, was held Reasonable. The Court thought this a Matter proper to be farther considered of; so ordered it to stand over. Vide post.

Anonymus.

How far the Court will direct peremptory Issues, in order to enforce their Process.

T*H*ERE having been a Distringas nuper Vic', and upon the first forty Shillings Issues returned, and upon the second, ten Pounds, *Mr. Parker* moved, that upon this, which was the Third, there might be peremptory Issues returned upon him to the Value of the Debt. Which the Court accordingly granted.

The King and Purfore.

Against what Person the Court will grant an Information for a Libel.

O*N* Rule to shew Cause, why an Information should not go against him for a Libel upon *Mr. Pike*, who was a Custom-house Officer, by which he exposed him for being cast in six Informations; *Mr. Strange* said, that on the Rule, which was obtained for shewing Cause, *Mr. Pike* had made Affidavit, that he was the Man that was cast in these Informations, by Reason of which he did believe that he was the Person that was exposed. But *Mr. Strange* submitted it, that as *Mr. Pike* had by this Affidavit ascertained himself to be the Person exposed; so he had shewn by it, that there was sufficient Reason for exposing him. For which Reason he hoped, the Rule for the Information should be discharged, and the Party left to his ordinary Remedy. And he remembered the same was done in the Case of The King and Bicarton, Hil. 8 Geo. 1. and in the Case of The King and Beharel, Mich. 11 Geo. 1. But the Court made the Rule absolute in the present Case notwithstanding.

The King *and* Franklyn.

MR. Fazacherly moved, that the Defendant might be discharged from his Recognizance. The Recognizance was taken before a Justice of Peace on the 10th of September was Twelvemonth, and the Condition of it was, that the Defendant should appear in this Court on the last Day of the then next Michaelmas Term to answer such Matters, as should be there objected against him, and not depart without Leave of the Court, and to be of his Good Behaviour in the mean Time. The Justice of Peace required him to give Bail to this Recognizance, and upon his omitting to do it committed him. Soon after the Chief Justice of England granted his Habeas Corpus to bring him up before him, and upon his being brought up bailed him upon it. The Attorney General filed an Information against him, which was not brought to Trial till the Sittings after last Trinity Term; and then was not tried by Reason that there was not a full Jury. Now, he said, the Prosecutor talks again of trying this Matter the Sittings after this Term. But he hoped, the Defendant should be discharged. He submitted it, that the Construction of this Recognizance was, that the Defendant should appear in this Court on the last Day of the next Michaelmas Term, and to be of his good Behaviour in the mean Time, and not depart the Court without Licence. The Doubt, he said, he did agree would arise upon the Construction, which the Court should put on the Words in the mean Time. But if the Court should not confine the Sense of it to the End of the next Term, but should extend it to any Period of Time, before they should signify their Licence for his departing, he submitted it, it would be a Recognizance of a very extensive Nature; and such a one, as has never been allowed of since the Habeas Corpus Act, and in Dalton 413. it is held, that a Justice of Peace cannot take such a one. If the Sense of these Words then was to be confined to the Time, which he contended for, the Defendant clearly ought to be discharged; for there was not so much as a Charge against him for the Breach of his good Behaviour within that Time. But if this Sense of the Words was not to be admitted, and the Recognizance should be allowed to be legal even in that general Sense; yet still he submitted it, that the Defendant ought to be discharged. Because by the Rules of the Court the Defendant is intitled to move, that he may be discharged after the End of the fourth Term, unless something can be shewn against him as a Breach of his good Behaviour within that Time. The four Terms were out at the End of last Trinity Term; and then nothing was done, but barely an Information filed against him, and if that should be sufficient, a Man would never be able to be discharged from such a Recognizance during his Life. The Chief Justice owned, that at the Time he bailed the Defendant, he did declare his Opinion was, that such a Recognizance could not be legal. But however, he said, there were a great Number of Precedents

How far the Court will not discharge a Man of his Recognizance.

shewn him at that Time of Justices of Peace taking them, and even of such being made out in this Court since the Habeas Corpus Act. The Court upon this declared, that they would not enter into a Debate about a Question of this Nature so late in the Term; and therefore at present they would take the Recognizance to be legal. Then as to the other Question concerning the Construction of it, they agreed it to be manifest, that the Words in the mean Time must be extended to that Period of Time, before they should signify their Licence for the Defendant's departing. And as to the last Question they were clear of Opinion likewise, that the bare filing an Information within the four Terms was sufficient, unless there was manifest Reason to think, that this was done only to oppress the Subject. Accordingly the Motion was disallowed.

Term. Hill.

5 Geo. II. 1731.

Anonymus.

MR. Kettleby moved for a Prohibition to be directed to one of the Ecclesiastical Courts, for holding a Plea in a Libel for calling a Woman a Strumpet, and saying these farther Words of her, I have seen you in the Act, Innuendo the Act of Incontinency. Judge Page did agree, that the Word Strumpet of itself would not have been sufficient to have supported the Libel; but as it is coupled with other Words, the Sense of the whole Expression can be no other than calling the Woman a Whore; accordingly the Court refused the Prohibition.

How far the Ecclesiastical Court have a Jurisdiction in a Suit for Words.

Anonymus.

ON Motion to set aside an Execution for Irregularity, Mr. Fazacherly said, that the Trial was so late as the last Sitting in last Term, which was the 26th of November, and the Rule given on the Postea for signing Judgment did not expire till the 2d of December; notwithstanding which, the Plaintiff last Vacation sued out a Fieri Facias, tested the first Day of last Term, returnable the last, and likewise a Testatum tested the last Day of that Term, returnable the first Return of this. This, he said, could only be endeavoured to be maintained by supposing, that the Judgment should relate to the first Day of last Term; but that he submitted it could not be; because, if it should, the Judgment must relate to a Time before the Cleridia; Accordingly the Court made a Rule to shew Cause.

How far a Writ of Execution shall be said to be regular, or not.

Anonymus.

MR. Fazacherly moved for an Information against one Mr. Smith, for assaulting Mr. Nox Ward, in Order to force him to sign a Paper, which he produced to him. He said, if Mr. Ward had signed it, undoubtedly the Court would have granted an Information for this Extortion; but the Court refused it in the present Case.

How far the Court will not grant an Information for an Assault with an Intent to extort Money.

Anonymus.

Anonymus.

When a peremptory Rule is made upon a Sheriff to return a Writ, how far it shall be with Costs.

MR. Brooks moved for a peremptory Rule upon a Sheriff to return a Writ. The Court said, that there appeared so manifest an Oppression in Sheriffs, by their not executing the Process duly as it ought to be, that they had resolved to grant these peremptory Rules with Costs; accordingly they did so in the present Case.

The King and Francklyn.

How far the Prosecutor must give a Rule upon the Postea for Judgment, before the Defendant can move that the Jury-Process may be recorded.

MR. Bootle moved that the Postea might be brought in, and the Jury-Process recorded. He said, Yesterday was the Day for the Return of the Distringas; and therefore now they were intitled to this Motion. He observed likewise, that in the Case of The King and Ward, and likewise in a former Case between The King and Franklyn, this same Motion was granted. But M^r. Masterman informed the Court, that the constant Practice was; for the Prosecutor to give a Rule upon the Postea for Judgment, before the Defendant can be intitled to this Motion. That the Prosecutor had not done this yet; and therefore the Motion was too early. But the Court declared, that this might be of dangerous Consequence to the Liberty of the Subject. For Suppose the Defendant was in Custody, and the Prosecutor would not give this Rule, this might be Imprisonment for Life. Accordingly the Court granted the Motion, unless Cause to the contrary To-morrow. Vide Post.

Maynard and The Manucaptors of Harvey.

How far Bail may be relieved upon Motion, without putting them to the Expence of an Audita Querela.

ON Motion to set aside a Judgment against Bail, upon an Affidavit, that the Principal was dead before the suing out of the Capias ad satisfaciendum against him, and that the Plaintiff had Notice of his Death before the taking out of the Scire facias; it was objected, that this was a proper Matter to be relieved upon by Audita querela, but not in this summary Method, by way of Motion; however, the Court made a Rule to shew Cause. Vide Post.

Pierce and Morris.

When a Defendant is sued as Executor, how far he shall be intitled to an Imparlance.

THIS was a Suit by Special Capias against the Defendant, as Executrix to her late Husband, and now M^r. Brown moved, that the Defendant might have Time to plead till the next Term, by Reason that there were many Debts owing from her Testator by Specialty, which were of a superior Nature to the present Demand, and those Specialties at present could not be known, so as to enable the Defendant to plead a special plene administravit. But the Court said, that it might be of dangerous

Consequence to allow so long a Time; because the Defendant might possibly take this Advantage to confess Judgments upon the Simple-Contract Debts; and those Judgments he would be intitled to plead in Bar to the present Demand. Accordingly the Court ordered him to move the Matter again, when he should have a proper Consent from his Client, not to take this Advantage.

Anonymus.

MR. Thede moved to set aside Judgment signed after executing a Writ of Inquiry; because the Writ of Inquiry was executed the last Day of last Term, and the Judgment signed that very Day; by which Means the Defendant had not the least Opportunity of moving in Arrest of Judgment. The Court said, it is well known, that when an Action is tried the last Sitting in Term, the Defendant has but one Day to move in Arrest of Judgment. And they took it, the constant Practice in the present Case was, that where a Writ of Inquiry is returnable the last Day of a Term, and executed the same Day, the Defendant has never a one. The Master too confirmed the same; accordingly the Motion was refused.

The Time which is allowed to move in arrest of Judgment.

The King and Busbey and others.

MR. Abney moved for an Information against the Defendant for forcing a Woman, that was in the Pains of Labour, to remove herself from the Parish of Charleton in Bedfordshire to the Parish of Harrow next adjoining, in Order that the Child might not be settled in the Parish of Charleton. He said, the like Motion was granted in the Case of the Parish of Godolvin in Surrey, and in another Case, about a Year ago on his Motion; accordingly a Rule was made to shew Cause, and the next Term it was made absolute. Vide Post.

How far an Information will lie against the Overseers of the Poor, for removing a Person unduly.

Martin and Moor.

THIS Matter coming on again, several of the most experienced Attorneys attended the Court, and informed them, that their Opinion was, that the Bail ought to be liable pro tanto as the Writ was marked for, and likewise all the Costs in the original Action. Mr. Atwood said, that he remembered the Case of Dan and Berry, and Dan and Freeman, which he was concerned in as Attorney, and that was Hill. 2 Geo. 1. The Writ there was marked for 17 l. 10 s. and a Bail-Bond taken accordingly; an Action was brought upon the Bail-Bond; and on Motion by the Bail for staying Proceedings on Payment of what was due, the Master reported, that 18 l. was really owing to the Plaintiff by the original Defendant; but yet the Court said the Proceedings on Payment of the 17 l. 10 s. Part of the principal Money, with Costs. And he produced the several Rules that were made on

Vide ante 44.

those Motions. Accordingly the Court declared themselves to be of the same Opinion; and a Rule was made for staying Proceedings on the Scire facias upon those Terms.

The King and Franklyn.

Vide ante 88.

THE Attorney General came now to shew Cause, and said, that the Rule which was drawn up, was, that the Postea might be filed, and likewise the Venire and Distringas. He declared, that he thought it unnecessary to contend, whether the Prosecutor has a Right to give a Rule for a Judgment, before the Defendant can be intitled to this Motion, and accordingly he had given a Rule upon the Postea for Judgment to put that Matter out of Dispute. But he did observe, that in the Crown-Office there was no File for the Postea, nor any for the Distringas. The Postea is always moved for to be brought into Court, and the Distringas is constantly annexed to it; both which were done in this Case. As to the Venire, he did agree, there was a File for that Purpose; and the present Venire was put upon that File, before the former Motion was made. Mr. Bootle on the other Side said, that he would not contend, but it might be sufficient to bring the Postea into Court, and likewise the Distringas annexed to it, that the Defendant might be able to take a Copy of them. But he observed, that in the Proceedings in this Cause there had been a former Distringas, and a Jury withdrawn upon it, so that a Trial upon that Distringas was never had. He said, he submitted it, that the Defendant had a Right to have that Distringas annexed to the Postea as well as the other; accordingly he expressed his former Motion in that Manner, that the Jury-Process might be recorded. The Chief Justice declared his Opinion to be, that the Defendant could not possibly have a Right to have the first Distringas annexed to the Postea, and he believed it was never before imagined in all the several Instances of this Sort, that continually happen at the Assizes. However, if they would have the Opinion of the Court taken upon that Point, they must make a proper Case for it by Affidavits of the Fact. Then as to the present Rule, the Court declared their Opinions to be, that the Postea and Distringas are never filed. Accordingly that Rule was ordered to be amended, and made, that the Venire should be filed, and the Postea, with the Distringas, brought into Court; and then the Court made a second Rule for discharging it. Vide Post.

Goodtitle and Pettoe.

Vide ante 10.

THIS Matter coming on again, Mr. Reeves argued for the Plaintiff, and said, there were two Questions to be made in this Case; one, whether the Defendant has any Title; and admitting he has not, the second Question will be, whether the Plaintiff has. In Order to shew that the Defendant has none, he submitted it, that the Distinction in the Books was clear

clear and manifest, between Uses raised by Covenants to stand seised to them, and Uses raised by other Conveyances; that in the first Case a Consideration is necessary to be between the Party claiming the Use, and the Party from whom the Use is claimed; but in other Conveyances this is not so; and so is the express Authority of *Mildmay's Case*, 1 Rep. 176. The Consequence of this, he said, clearly was, that the Use could not arise to the Person, whom the Defendant claims under; because no Sort of Consideration arises from her, which the Covenantor has any Benefit from. The second Question, he did agree, was more difficult; but yet he hoped it would appear, that it intirely fell within the Reason of the Case before cited, it is said there, that in these Covenants to stand seised, an Averment of any Consideration may be well allowed, though by Matter out of the Deed, provided such Consideration averred may stand consistent with the Considerations expressed within the Deed, and the Person who is to take Benefit of this Consideration, is ascertained by the Deed likewise. He observed likewise, that this Rule is declared to be Law in 7 Rep. 40. and in 11 Rep. 25. and if this should be allowed to be Law, he said, it would directly determine the present Point; for the Lessor of the Plaintiff is by Name ascertain'd in the Deed, and the Consideration stated by the Case of his being of the Blood of the Covenantor, is intirely consistent with the Considerations that are expressed in the original Instrument. Mr. Fazacherly on the other Side argued, and said, that however plain the first Question may be thought to be at present, he believed, upon considering it more fully, it would not appear so. He said in the Case of *Dighton and Tomlinson*, which came into this Court upon a Writ of Error, out of the Common Pleas, it was strongly debated upon the Words of a Will, whether an Estate given to a Woman for Life, with Power to dispose of the same to any Person and his Heirs, according to her own Discretion, was not a Fee-simple in her. It was agreed at that Time, that the giving her such Power, without an express Estate for Life only, would clearly have amounted to the Gift of a Fee-simple; but as there was a particular Estate given her by express Words, the Court were of Opinion there, that the Estate given was only an Estate for Life. He observed, that the Words of Uses, were to be construed in as free and liberal a Manner as the Words of Wills; and if that was a Point that would bear strongly contending for in that Case, he submitted it, that it ought to be allowed in the present one, inasmuch as the Counsel of the other Side insist, that these Words, if they should operate barely as a Power, would be absolutely void. Upon this Argument therefore, the Words of the Use relating to the Wife, ought to give her a Fee-simple; and if so, it was clear there was a good Title found in the Defendant. But besides this Argument, he submitted it, that there was another, that the Defendant's Title might be well maintained by; and that was, by considering these Words only to lodge a Power in the Wife to convey these Lands to any Body else. He said, in 2 Rol. Ab. 784. it is held, that in Consideration of Money paid by B. a Man may covenant to stand seised to the Use of C. and his Heirs; and

and C. and his Heirs shall take Benefit of this Consideration. If this was so, he submitted it, that the Person whom the Defendant claims under, might equally take Benefit of the Consideration arising from the Wife. Then as to the second Question, he hoped by considering that, that the Case would appear still stronger against the Plaintiff. He did agree, that in Cases cited out of the 7th and 11th Report, there were those general Expressions, that have been mentioned; but the particular Cases relied upon in those Books for that Purpose, by no means warranted them; for one of the Cases is put of a Use limited to a Wife by express Name; the other of a Use limited to a Brother by express Name. And he did agree, that in those Cases a Use would well arise to the Wife and to the Brother, by Virtue of an implied Consideration of Love and Affection, equally, as if it was expressed. But in the present Case, the whole Consideration, relating to the Lessor of the Plaintiff, must be supplied by the Averment out of the Deed. And besides what Objections might be made to such Averments by the Common Law, those Objections were still stronger since the Statute of Frauds and Perjuries, which declares, that no Trusts and Uses shall be raised out of a Deed by Parol. He took Notice farther, that it was not stated by that Case, that the Covenantor intended the Lessor of the Plaintiff should have the Remainder of this Use, out of any Consideration of his being of his Blood. For which Reason he submitted it, that what was stated by the Case, in Relation to his being of the Blood, was only Matter of Evidence, that the Covenantor intended he should have the Use from that Consideration: and consequently the Case was subject to this Objection equally as a special Meridian would have been. The Court, upon the whole, declared themselves well satisfied, that the Defendant's Title could not be maintained; because the Words, which he claims under, can only operate by way of a Power in the Wife; and the Person, whom he claims under, can have no Benefit from it; in as much as no Consideration arises from her to the Covenantor. As to the second Point, the Court declared themselves to be under considerable Difficulties. The Chief Justice and Judge Page were of Opinion against the Plaintiff; Judge Probyn and Judge Lee were of Opinion for him. But they all considered the Case as at Common Law, and likewise that the Case was well stated; accordingly it stood over. Vide Post.

Perry and Cortesoes.

The Time which a Defendant is allowed to plead in.

THIS was a Suit by Special Capias, wherein the Plaintiff had offered to deliver a Declaration de bene esse before the Time, which the Defendant appeared in, but Defendant refused it; the quarto die post for the Defendant's appearing in, was to Day; and now Mr. Fazacherly moved, that the Defendant might have four Days to plead in. He said, he made this Motion more out of a Scruple, which the Defendant's Attorney lay under, than any real Doubt which he had himself, in Relation to the Practice of the Court in this Respect. For he took it to be clear, that

that no Declaration could possibly by the Practice of this Court be delivered to a Man, till he had appeared; and therefore in the present Case the Defendant was of Course intitled to four Days to plead in after his Appearance. M^r. Strange on the other Side argued, and said, that the Practice of the Court of Common Pleas undoubtedly was, that if a Defendant does appear to a special Original or special Capias, his four Days for pleading shall be computed from the Day of the Delivery of the Declaration *de bene esse*, though before Appearance, and not from the Day which he does appear of. He observed, that if this was so in the Common Pleas, there was equal Reason, that it should be so in the King's Bench. And the Reason in both Cases was manifest; because by the Original or Capias being special the Defendant has as full Knowledge of the certainty of the Cause of Action against him, as he has after he has appeared and the Declaration is delivered to him. He took Notice farther, that if this was not so, though a special Original or special Capias be returnable the very first Return of the Term, it would be impossible by the Course of the Court, that a Plaintiff could go to Trial at the Sittings within Term; by which Means the other Court would have an apparent Advantage of this in the Expedition of their Proceedings. And he said, he was well satisfied, that in Point of Fact, Declarations of this Sort have been delivered of late in many Instances, and Defendants have pleaded within the four Days computed from such Delivery. The Court declared that these special Originals have been but of late Date in this Court, and at first they were only allowed in Suits, that were *quare vi & armis*. They said, that whatever the Fact may have been, that such Declarations have been accepted, this has by no Means yet been the settled Practice of the Court; and therefore the Defendant had a Right to four Days to plead in from the Day of his Appearance. However they made a Rule, that for the Future the four Days should be computed from the Day of the Delivery of the Declaration *de bene esse*, both in Proceedings by special Latitat, as well as in Proceedings by special Original.

The King and Pool.

S. C. by name of King & Price L. Kel. 110.

ON Rule to shew Cause, why an Information in the Nature of a Quo-Warranto should not go against the Defendant for exercising the Office of Capital Burgess in the Town of New Radnor, not being an Inhabitant at the Time of his Election; M^r. Reeves said, that the Clause of the Charter only declared, that no Capital Burgess should exercise his Office any longer than he is an Inhabitant in the Corporation, which is no express Declaration, that they shall be Inhabitants, at the Time they are elected. And besides, the present Defendant came with his Family and inhabited in the Town before the former Motion was made for the Information. He said, he submitted it, that the Court would now determine this Point

What Persons are capable of being elected Members of a Corporation.

on the Rule for shewing Cause, and would not put the Defendant to the Expence of a special Verdict. Accordingly he observed, that the Court had determined a Point of much greater Difficulty than this, in the Case of the Town of Pomfret, when that Matter came before them in the same Manner, as the present one. There the Charter required, that no Person should be Mayor, unless he was an Inhabitant at the Time of the Election. A Person came and lodged at an Inn for a Month; and the Court determined that to be a sufficient Inhabitaney to qualify him for such Election. However the Court made the Rule absolute; and thought this a Matter proper to be determined in a more solemn Way.

Russel and Ford.

What shall
not be said
to be a good
Plea of Pay-
ment before
the Com-
mencement of
the Action.

IN an Action upon several Promises the Defendant pleaded, that before the Commencement of the Suit, the Plaintiff and Defendant came to an Account, and upon the Balance there was 5 l. found to be owing to the Plaintiff, which was agreed should be paid to one whom the Plaintiff was indebted to; accordingly the Defendant averred, that he did pay it. To this the Plaintiff demurred generally, and the Defendant joined in Demurrer. Mr. Draper now argued for the Plaintiff, and said, that the Reason for the Demurrer was, that the Defendant did not aver, that the Money was paid by him before the Commencement of the Action. Accordingly the Court gave Judgment for the Plaintiff.

Holley and Mullins.

How far the
Court will
not stay the
Proceedings
in one Action
till the Costs
of a former
are paid.

IN an Action for an Escape brought by an Executrix against the Marshal, Mr. Strange moved, that Proceedings might be staid, till she paid the Costs of a nonsuit in a former Action upon the same Demand, and compared this Case to that of a Pauper. But the Court (Chief Justice absent) said, that this Motion has been often made, but never allowed; accordingly it was refused in the present Case.

Cortefoes and Munes.

IN a Proceeding by special Capias, the Addition of the Defendant was nuper de London Mercator; the Defendant demanded Oyer of the Writ, and pleaded in Abatement to it, that he was an Inhabitant of the Parish of Mackpelen, *alias* White-Chapel, in the County of Middlesex, at the Time of the suing out of the Writ, and that he had not been an Inhabitant in London for four Years before the suing of it out; absque hoc, that he was an Inhabitant of London at the Time of the suing of it out. Mr. Fazakerly moved to set this Plea aside. He said, that he did agree, that it was necessary to Name the Defendant by the proper Degree or Mystery, which he was of at the Time of the suing out of the Action; but he submitted it, that it was otherwise in the Case of a Man's Place of Abode, and that in such Case the Describing him by a nuper was sufficient. For this Purpose he relied upon the Words of the Statute of Additions, and likewise the Comment upon them in 2 Inst. 669. He said likewise, that he apprehended, the Law was so well settled in this Point, that the Court would relieve upon Motion. Mr. Draper on the other Side argued, that there are Cases in the Books, which make this Point doubtful; and particularly cited 4 E. 4. 10. But the Court thought proper to set the Plea aside; and accordingly made a Rule for that Purpose.

When a Defendant pleads in Abatement, that he has not his proper Addition given him, how far the Court will set aside a Plea of that sort upon Motion.

The King and Franklyn.

MR. Bootle now moved, that the Verdict obtained in this Cause might be set aside, for that the Jury, which tried it, had no Authority. The Issue, he said, was joined in Easter Term last, and a Venire sued out, returnable in Trinity Term. In Trinity Term the Attorney General applied to the Court for a special Jury in Pursuance of the Statute passed in 3 Geo. 2. which was granted him; and the Rule was drawn up in this Manner, that there should be a Jury struck by the Master in the Form that special Juries are, *ad triandum exitum in hac causa ad Sessionem de Nisi prius post hunc Terminum*. The Cause came on accordingly to be tried at the Sittings after that Term; but a Remanet was entered pro Defectu Juratorum; and a Vic' non misit breve entered upon the Distringas, that was returnable the first Return in Mich. Term. A second Distringas was afterwards sued out, tested in that Term, and returnable in this, with a Clause of Nisi prius in it for the Sittings after that Term. The Cause then accordingly came on again to be tried at that Sittings; and was tried by twelve of the same Panel that were returned upon the first Distringas, being Part of the Twenty-four struck by the Master, though not the same Persons that were actually sworn, when the Remanet pro Defectu Juratorum was entered. This, he said, was the State of the Fact, and he submitted it to be irregular; for that the Time, in which the Court gave the Attorney General to try this Cause

Vide ante 88.

in by a special Jury, was expired; and consequently this Cause ought to have been tried in the common Way by Balloting, as the Statute of 3 Geo. 2. directs. He observed, that before this Act, special Juries were never granted in this Court, but by Consent; though in the Courts of Common Pleas and Exchequer they were frequently without it. That Statute allows them to be granted in all Informations and Indictments for Misdemeanours, as well as in Civil Causes. But in all Cases, except in those of a special Jury, the Trial at Nisi prius must be by balloting, as the Statute directs. The Question therefore is how the present Trial can be supported by Virtue of the Rule for the special Jury. The Rule was for trying it within a limited Time; and the Trial has been at a Time beyond what was limited. He observed, that it would be no Objection to say, that this Mistake ought to have been insisted on at the Trial, and taken by Way of Challenge; for where any Mistake is discovered, that shews that either the Judge or Jury had no Authority to try the Cause, such Mistake may be shewn at any Time. And these Exceptions have been allowed and taken after a Trial, where there has not been a sufficient Number returned upon the Panel, as the Law directs, though there have been enough returned to try the Cause with. And therefore where Twenty-three only have been returned upon the Panel, and Twelve of them sworn, that has been held to be an Exception to be taken at any Time. For this Purpose was cited Sav. 124. 5 Rep. 37. 1 Cro. 278. Roll's Abr. 800. Though he did agree the Statute of Jeofails had now cured that. He said, it might be difficult possibly to shew Precedents in this Court, where new Rules for special Juries have been granted, when such Accidents have happened; but in the Common Pleas they have frequently; accordingly he had two Rules to produce of this Sort, made in that Court between Peirson and The Bishop of Chester. He observed farther, that in these Informations Defendants are always under great Disadvantages by Reason of the Difficulty there is to get Copies of the Proceedings. Anciently, he said, he has been informed the Postea used to be brought into Court and filed in Civil Causes. Now that is not done; but still a Copy of the Postea is never denied in those Cases. In Criminal Proceedings the Officers of the Court will never allow a Copy of the Postea to be made; but how legal this was, he submitted it to the Court. A hard Case, he observed, that at least it was; because it is well known, that these Informations are often altered by Order from the Attorney General with the Allowance of a Judge. He then produced Office-Copies of the two Rules in Court made in the Common Pleas, and likewise Affidavits of the Fact, which his Motion was founded upon. But the Attorney General objected to this in Point of Evidence; and submitted it, that the Office-Copies of the Rules ought to be verified by Affidavits by Reason that they are made by Officers of another Court; and as to the Fact, viz. which of the Jurymen were sworn, that ought to be taken only from the Record. Then as to the giving Copies of these Records, he said, the Defendant had had Copies of

of the Venire and Distringas, neither of which he was intitled to. But to have a Copy of the Postea, he believed, was never before attempted on the Crown-Side. Then as to the amending these Informations by Order from him, that is never done, but where the Mistakes are very small; in other Cases the Court is always moved. The Court, however, thought these Office-Copies sufficient Evidence, without Affidavits to prove them to be true Copies; and that such Office-Copy is always credited, when an Officer from the Court of Common Pleas attends here with a Rule of that Court to amend the Record sent up by a Writ of Error, by the Transcript of it in that Court. And as to the other Objection, that the Fact of the Jury's being sworn ought to be taken from the Record, and not from Affidavits, the Counsel of the other Side answered it, by saying, that this was a Motion to set aside the Verdict, and not a Motion in Arrest of Judgment. Then as to the giving Copies of the Postea in the Crown-Side the Court said, they were informed by their Officers, that this is never allowed of. Accordingly these Office-Copies were allowed of, and the Affidavits relating to the other Fact were read likewise. And then the Attorney General prayed Time till Tuesday, to answer the principal Objection, which was accordingly granted him. The King's Counsel came at the Day appointed, to answer the Objection. They said, the Objection was, that the Jury had no Authority to try the Cause; and the Reason given was, because the Rule of Court gave them their Authority; and that Rule of Court was expired before they acted under it. The Answer, which they beg'd Leave to offer, was, that the Rule of Court is not the Thing which gives them their Authority, but the King's Writ of Venire facias. The Rule of Court is only an Authority to the Officers to appoint the Jurors; but the Venire facias is the Authority of the Jurors to try the Cause. If therefore there should be any Defect in the Rule, the Venire facias is still an Authority to the Jurors to try the Cause; for which Reason it cannot be said that they had no Authority. But in Reality they observed, that the Rule itself was sufficient, without any Enlargement or Amendment. And that, because the Words of the Statute of 3 Geo. 1. expressly are, that the Jurors appointed by the Officer in Pursuance of the Rule, shall be the Jurors which the Sheriff shall return upon the Venire, and they shall try the Cause. The Jurors were struck by the Masters in Pursuance of the Rule; and the Ad supplies the rest. Then as to what Objection may be made from the Words in the Rule *ad triandum Exitum*, &c. the same Objection might be made to all the common Rules, where the Words are, *ita quod trietur ad proximas Assisas*; but such Objection was never attempted. In the Rules drawn up for a View, this Clause is constantly inserted; but where a Remanet is entered, a new Rule is never applied for. And the same is it of Rules for Special Juries in Trials at Bar. They said too, that they were informed the constant Practice is so in the Court of Exchequer, even in Special Juries granted for Trials at Nisi prius. As to the Practice of the Court of Common Pleas in this Respect, they said, they did agree it to be so; but it has been so no longer than the Statute of 7 & 8

Will. 32. and that depends upon a Reason, which the present Case will be not at all affected by. That Statute provides, that in any Trial intended to be had at the Assizes, if the Plaintiff or Demandant shall not think proper to proceed then, he may bring the Cause down to Trial at any other Assizes, by Venire facias de novo; and upon that Venire a new Panel shall be returned. It is no Wonder then, that in the Common Pleas, where Special Juries were frequent before the Statute of 3 G. 2. if a Special Jury did not try the Cause within the Time prescribed by the Rule, another Rule was moved for; because another Venire was to be, and another Panel returned upon it. But the Statute, they submitted it, did not extend to the Crown. And in Fact, no new Venire has ever been granted in the Case of Crown Prosecutions, unless where the first issued irregularly; and in those Cases, and no other, a Venire de novo always issued before that Statute. They observed farther, that if this Objection could ever have been good, it ought to have been taken by way of Challenge to the Array, at the Time of the Trial; and the Objection comes now too late. The Reason for this, they said, was evident; because the Objection arises from a Matter of Fact, and is an Objection to the whole Array of the Panel; which therefore ought to have been tried and judged of by Elisors chosen for that Purpose. In the present Case too there was a still stronger Reason to shew that this Objection was too late; because the Defendant actually challenged one of the Polls at the Trial; and therefore this Objection, which is a Challenge to the Array, cannot now be made. For this Purpose was cited 3 Cro. 574. and likewise an Anonymus Case, 13 Will. 3. That was an Action for Words, and the Defendant obtain'd a Rule for a good Jury; a common Jury was however returned; and for this Reason he moved for a new Trial. But, because he had made a Defence, the Court refused the Motion. This was the Substance of what was urged by the King's Counsel in Answer to the Objection, and the Court gave the Defendant's Counsel till Thursday next, to reply. The Defendant's Counsel came at the Day, and said, that they hoped, the Answers given by the King's Counsel would not be thought sufficient. They took Notice, that the King's Counsel would have it imagined, that the Authority of this Jury depended wholly upon the Venire facias, and in no Part upon the Rule; but they submitted it, that if it was not for the Rule, the Venire facias to return twenty-four only, would be erroneous; and consequently their Authority must depend upon the one, as well as upon the other. The Rule therefore must be regarded, and it must be seen, whether that can give the Jury, that tried the Cause, the least Authority for doing it. They said they would not go over the Objection again, which they before relied upon, taken from the Words of the Rule; but submitted it, that the Court could not have made a Rule, by which the Jury should have been obliged to continue attending any longer Time than the next Sittings at Nisi prius; and if they could, the Act of 3 G. 1. might be wholly evaded. They observed, that the two great Designs which were aimed at by that Statute, were to prevent the Jury's being known before the Trial, as much as possible, and likewise their being bound to long

long Attendances from one Assizes to another. But they apprehended, that if the present Practice should once prevail, these two great Designs of the Legislature would be ineffectual; for according to this Doctrine, these Juries might always be forced to continue upon the Panel, till the Parties should think proper to make an End of the Cause; and by this Means an Opportunity would be offered of applying to them in the mean Time, and of continuing their Attendance to their great Vexation. These Objections, they said, they begged Leave to offer against the present Rule; and now they desired to consider the Objections insisted on by the other Side against a new Rule. They observed, that they were founded upon this, that a *Venire de novo* could not be awarded. But they apprehended, that it might by the very same Reason, as a new *Distringas* was. In Order for the issuing that, they observed, that it was necessary that an Entry should be made upon the Roll, *quod Vicercomes non misit breve*, which was a direct Falshyp. For he did return his Writ, and eleven of the Jury were actually sworn in Pursuance of it. But by the same Reason, that that was done for the awarding a new *Distringas*, the like might have been done for the awarding a new *Venire*; and then the whole Intention of the Legislature would have been preserved. In order too to shew that the like has actually been done, they cited 5 Rep. 41. Allen 18. 2 Rol. Ab. 720. and Hob. 130. They said farther, that the Words quoted out of the Statute of 3 Geo. 1. in order to shew that such second *Venire* could not be in this Case, were not as were cited. For they are, that the forty-eight in the one Case, and the twenty-four in the other, shall be the Jury returned to try the Cause, and not the Jury which shall try it. And this Observation, they said, the Chief Justice made upon the Aſ at the Sittings at Nisi prius, when this Cause was first intended to be tried. A *Tales* there was prayed by the King's Counsel *pro defectu Juratorum*; the Defendant's Counsel urged, that it could not be by Law, and principally relied upon this Part of the Aſ; but the Chief Justice then over-ruled them, and ordered that a *Tales* should be granted; indeed it was not had; because the Attorney General consented then to withdraw a *Juro*. They observed farther, that the Counsel for the King had insisted, that the Defendant was too late in this Objection, in Point of Time. But to this they submitted it in the first place, that this Exception could not be taken by way of Challenge; and for this Purpose cited 2 Ven. 58. and farther relied upon the Authorities before cited by them; as being directly in Point. The Court then debated the Matter a little between themselves; and said, that they would give their final Opinion on Monday. Vide Post.

The King and The Inhabitants of Drakemast.

ON Rule to shew Cause, why an Assessment of a Poor's Rate should not be returned upon a *Certiorari*, Mr. Reeves said, that this Assessment was appealed from by one of the Inhabitants that were assessed, and the Court of Sessions only made an Order relating to that Man; for which Reason they were
not

Vide ante 93.

not obliged to return upon the Certiorari, any Thing more than that Order, which they have done; and as to the other Part of the Rate, that the Sessions have not meddled with; and consequently it is no Part of their Records, nor any Act of that Court. Serjeant Birch on the other Side answered, that the Words of the Certiorari requires the Justices at their Sessions to send up all Orders concerning the Parish of Drakemast, cum omnibus ea tangentibus; the Order which they have sent up, takes Notice of a Poor's Rate which had been appealed from; for which Reason he submitted it, that they had a Right to see the Rate itself, which the Order was made upon. He observed, that where an Order of two Justices for a Removal, is appealed from to the Sessions, and a Certiorari is sent down to the Sessions, requiring them to return up all Orders, the original Order is always returned, as well as the Order of Sessions made in Pursuance of it. He took Notice too, that an Appointment of Overseers is removeable up by Certiorari; and in general said, that all Acts coming before the Sessions are removeable up, unless where the Poor in the mean Time will be left in a starving Condition. He did agree, that in the Case of The King and Egleshall, Mich. 13 Geo. 1. where the Examination of Witnesses was returned, the Court did declare, that they could do nothing upon that; but that, he said, was barely Matter of Evidence. And in the present Case he said, that there was more particular Reason to remove up this Rate, than generally happens; because he had an Affidavit to produce, that the Rate was signed only by one Justice. The Court would not allow the Affidavit to be read; but as to the principal Point, Judge Page said, that he did believe Certiorari's have removed Assessments of this Nature; otherwise he could not see how the Court could have given so many Opinions as they have done, about the Legality and Illegality of them. He said too, that according to his Remembrance, a Rate of this sort was removed up in the Case of The King and Tawney, and likewise in the Case of the Parish of St. James. He observed, that in the last Case the Certiorari was filed upon the Return; and then indeed the Court were under some Difficulties, whether they could send the Rate back or not, in order to be levied upon the Inhabitants. Judge Probyn and Judge Lee seemed too to be of the same Opinion; but Judge Lee said, that he did not take this to be so strong a Case, as that of the Order of two Justices before cited; because the Order of two Justices is a judicial Act; but this is not so. And therefore in Mandamus's requiring two Justices to sign these Rates, it has been determined, that they can make no Return in Excuse for not signing them. However, as the Chief Justice was not in Court, they said, it might be proper to move this again; and therefore enlarged the Rule, directing their Officer in the mean Time to search for Precedents. Serjeant Birch then said, that he had found that the Rule for the Certiorari, which had removed up the Order of Sessions, was drawn up wrong; for it was, that a Certiorari should go to remove up an Order, quashing a Poor's Rate; but he observed, that that Order had only quashed it in Part, and not in the whole; for which Reason he moved, that it might be amended. But the Court

said, there must be then a new Rule made for there going a new Certiorari. Accordingly the Serjeant moved for such Rule; and it was granted. Vide Post.

Floyd and Jones.

UPON a Writ of Error on a Judgment in the Common Pleas in an Action for Words, Mr. Strange took an Exception to one of the Counts where the Words were, speaking of the Plaintiff, I will have him transported for Perjury and Forgery. He said, the Import of these Words were no more, than that the Plaintiff deserved to be transported. And he observed, that in Yel. 90. and likewise in Rol. Ab. 44. it is held, that to say of a Man, that he deserves to be hanged is not actionable. But Judge Page and Judge Probyn said, that they believed it was never determined, but to say of a man, that he deserved to be hanged for robbing upon the High-way, would be actionable. Besides too, there were Special Damages found in the present Case. Accordingly, the Chief Justice absent, the Judgment was affirmed.

How far the charging a Man with Perjury shall be said to be actionable.

The King and Heber.

ON Rule to shew Cause, why an Information should not be granted against the Defendant, who was a Justice of Peace, for convicting two Persons, Hargrave and Lancaster, for killing the Game without a License; the Complaint in Relation to Hargrave was, that the Defendant sent his Warrant for him, by which he was arrested, without any previous Information upon Oath; and when Hargrave came before him, and was convicted by him, the Defendant took a Note for the Honey of Hargrave, without sending any Person to inquire whether there was not a sufficient Distress upon the Premises; and besides, after this the Defendant tore the Note, and then made out an Order of Distress, which was afterwards executed. The Complaint against him farther in Relation to Hargrave was, that the Defendant being informed, that Hargrave had spoke disrespectful Words of him for this Transaction, sent his Warrant for him to bring him before himself; so that in that he acted both as Judge and Party. The Complaint in Relation to Lancaster was, that he happened to be present at the Time the Defendant was making his Conviction against Hargrave; and upon that the Defendant took an Opportunity of convicting him too, without giving him any previous Summons, by which he might prepare himself for his Defence. The Court, Chief Justice absent, were very clear, that an Information ought to go against the Defendant for his Behaviour in Relation to Lancaster; for they said, it was a most known Rule of common Justice, that no man ought to be convicted of an Offence, till he has previous Notice given him of the Charge, that he may be prepared to put in his Answer to it. Accordingly the Rule was made absolute, as to him. As to that Part of the Complaint, re-

Vide ante 77. How far the Court will grant an Information against a Justice of Peace.

lating to Hargrave, whereby the Defendant was charged with adding both as Judge and Party, the Court seemed to agree, that was regular enough. For the speaking disrespectful Words of a Magistrate is a publick Offence, which any Magistrate is a proper Judge of. But as to the two other Matters relating to Hargrave, Judge Probyn said, that he should have thought the Rule ought to be made absolute against the Defendant, were it not that Hargrave had brought an Action for this matter, and by that had determined his Election. He said, a Warrant deprives a Man of his Liberty; and therefore a Summons ought only to issue, and not a Warrant without an Information upon Oath. He said likewise, that the Justice ought not to have accepted barely of the Party's Note, without first inquiring of the Premises, whether there was a sufficient Distress or not. But when he had done so, he ought to have been contented with it, and should have taken no other Execution. But the other two Judges declared their Opinion, that an Information ought not to have went against the Defendant, for any Matter of Complaint relating to Hargrave, though Hargrave had not brought an Action. Accordingly the Rule was discharged as to that Matter.

The King *and* Pownal.

How far the Court will grant an Information for a Challenge.

ON Rule to shew Cause, why an Information should not go against the Defendant for writing a Letter to one Mr. Willis, supposed to amount to a Challenge. The Court now declared their Opinions, that it did not; accordingly were discharging the Rule. But then Mr. Fazacherly said, that he submitted it, the Letter would at least amount to a Libel; for in it the Defendant calls Mr. Willis a Scoundrel. He observed, that in the Case of The King and Pilbrough, the Court granted an Information against him for calling Mr. Barnardiston a Fool, and a Rascal, in a Letter which he sent to him; and he submitted it, that it was as great an Offence to call a Man a Scoundrel. Mr. Abney on the other Side said, that he believed the Court had never gone so far in any Case, as they did in that of The King and Pilbrough. But still, he said, taking the whole of that Letter together, which was sent to Mr. Barnardiston, he took it, there were Words of a greater Insult, than barely calling a Man a Scoundrel. But if the Court had any Doubts with themselves in that Point, he prayed a farther Day for answering the Gentlemen of the other Side, as to that. For now, he said, they have thought of a quite different Offence to maintain their Rule upon, from what they thought of at the Time they obtained it. Accordingly the Court enlarged the Rule to a farther Day. Vide Post.

— and Glover.

THE Plaintiff having brought twenty-eight Actions against as many Subscribers of a Policy of Assurance, Serjeant Eyres moved, that the Plaintiff's Proceedings might be stayed in all these Actions, but one, upon the Defendants being all willing to enter into a Rule, that the Event of their several Actions shall depend upon the Event of the Trial of this one. He said, he was apprehensive the Plaintiff would object possibly, that the Sums which the several Defendants have subscribed for were different, and consequently the Plaintiff was intitled to different Damages; but he observed, that those Damages might be proportioned according to the different Subscriptions; and therefore he had got an Authority from the several Defendants to consent likewise, that if the Trial shall go against that one Defendant, whom the Plaintiff shall pick out, the Defendants will enter into a Rule, that the Damages, which they shall be answerable for, shall be proportioned according to their several Subscriptions. Mr. Reeves on the other Side said, that he had no Authority to consent to such Rule. Accordingly, Chief Justice absent, the Court declared, they could do nothing in it.

How far the Court will not stay Proceedings in one Action, notwithstanding the Defendant agrees to submit to the Event which shall be in another.

Perry and Cortesoes.

MR. Fazacherly moved to discharge a Rule, which required the Defendant to plead such a Plea as he would stand by. He said, that before the Plaintiff had obtained this Rule, he had made up the Paper Book, given a Rule upon it for the returning it, by which it is always understood, that the Defendant should join Issue, or demur; and the Defendant had actually demurred. For which Reason he submitted it, that the Rule, that the Plaintiff had obtained, was intirely irregular. But the Court said, a Demurrer is a Plea. Accordingly refused to discharge the Rule.

How far the Court will not require a Defendant to plead such a Plea as he will stand by.

Catherol and Cowper.

AN Action having been brought against the Defendant as Collector of the Turnpike between Chelsea and Fulham, and the Plaintiff having been nonsuited at the Trial, Mr. Abney said, that the Defendant was intitled to treble Costs by the Statute of 12 G. 1. which created this Turnpike. But he observed, that the Action, which the Plaintiff had brought, was a common Action, not appearing at all upon the Face of the Record to have been brought upon this Statute; and therefore he submitted it, that it would be Error in the Court to give treble Costs, without a Special Entry being first made upon the Postea, that it appeared upon the Trial, that the Action was brought upon this Act. And therefore he moved that such Entry might be made. He did agree, that such Costs are general-

When a Defendant is intitled to treble Costs, what is the proper Method of his taking Advantage of them.

ly given upon a Certificate of a Judge ; but that is only done in such Cases, when Statutes have given Power to Judges to certify. And that he observed was the Case upon the Statute of 7 Jac. 5. made perpetual by 21 Jac. 12. upon 22 Car. 2. 9. 8 & 9 W. 11. and 4 & 5 W. 18. But the very Thing which he now prays, he said, was done in the Case of The King and Poland, Pasch. 3 Geo. 1. The Defendant was there indicted on the Statute of 5 Elizabeth, for exercising the Trade of a Glover, without having served a legal Apprenticeship. On Evidence it appeared, that he was a Soldier, and had served in the late Wars ; by Reason of which he was intitled to set up any Trade within the express Words of the Statute of 9 W. 3. accordingly he was found Not guilty. Upon that Serjeant Cheshire said, that the Statute of 9 W. 3. gave the Defendant treble Costs ; and therefore he prayed, that such an Entry might be made on the Postea, as is desired in the present Case ; and it was granted him. He said likewise, that Serjeant Cheshire in his Motion cited the Case of Bateman and Wallis, Trin. 9 W. 3. where the same Thing had been allowed once before upon that Statute. Mr. Fazakerly on the other Side argued, and said, that he submitted it, the treble Costs in this Case could only be allowed upon a Certificate of the Judge that tried the Cause. It is well known, that it is the constant Practice of the Assises to apply to a Judge to certify, without at all regarding whether any Statute has given the Judge such Power or not ; and he apprehended, such Certificates were always credited by the Court above, as being the proper Evidence of what happens upon the Trial, and does not appear upon the Record. But he submitted it, that the Defendant was too late now to take this Remedy ; and consequently too late to have any Remedy at all. Certificates of this Sort, he observed, are constantly moved for to be made by a Judge of Assise, as soon as the Cause is tried. In the Case of The King and Mott, Mich. 1 Geo. 2. an Application was made to a Judge at his Chamber to certify ; it was argued there by Counsel on both Sides, whether he had a Right to do it now or not ; and upon Conference with many of the Judges, he at last declared his Opinion to be, that he had not. Upon a Bill of Exceptions between Wharton and Marriot in the Court of Exchequer, it was determined that that could not be signed but by the Judge in open Court, as soon as the Cause is tried. And the same was determined in the Case of Carve and Wright, afterwards in this Court. He said, as to the Case of The King and Poland, which the other Side has relied upon, that might very well be allowed for Law, without any Ways affecting the present Case. For that was an Indictment ; and therefore it would have been Error to have given any Costs without a special Entry. But here, he said, in every common Case the Defendant is intitled to some Costs ; and whether those Costs are trebled or not, need not appear upon the Record. The Court declared, that they saw no Reason, why the Master could not ascertain these Costs upon Affidavits ; and therefore made a Rule to shew Cause for that Purpose. And Judge Lee said, though in general Cases a new Trial is granted only upon the

the Certificate of a Judge; yet in the Case of Lord Chief Justice Pratt's dying before such Certificate could be made, the Court granted a new Trial upon Affidavits. Vide post.

The King and Bell.

AN Indictment having been found against two Constables jointly and severally for disobeying an Order of Sessions, Motion was made to quash it; because there ought to have been several Indictments. But the Court said, they thought this Offence too great to quash an Indictment for it; and therefore left them to their ordinary Remedy by Demurrer.

How far the Court will not quash an Indictment by Reason that the Offence contained in it is too great for that Purpose.

Hart and Harrison.

ON Motion for a new Trial upon an Issue directed out of the Equity-side of the Court of Exchequer; because the Defendant was now prepared with better Evidence, than he could be at the Time when the Cause was tried; the Court declared, that that never should be any Reason with them for granting a new Trial upon such Issue, any more than upon a common one. And Baron Carter said, that if any such Issue should come to be tried before him, with Directions from a Court of Equity to admit Evidence, which was not legal, he would never comply with such Direction.

Maynard and The Manucaptors of Harvey.

MR. Filmer came now to shew Cause, and said he did agree, that this was a Judgment against Bail by two Nihilis only, and not upon a Scire facias; but yet he did submit it, that the Court would not relieve in a summary Method. He said in Salk. 264. Lord Chief Justice Holt declared, that upon two Nihilis the Court will relieve on Motion, unless where the Party has a Release to rely upon, or some such Matter of Fact. Which is a direct Admission, that where the Party has a Matter of Fact to be relieved upon, he shall not be relieved on Motion. Now this, he observed, was directly the present Case. For the Bail alledge, that the Principal died before the Duing out of the Capias ad Satisfaciendum. He said likewise, that in Skin. 120. there was another strong Case to the same Purpose. But the Court declared, that they thought the Case in Salk. must be understood, that the Court will not relieve on Motion, where the Fact is controverted; but here there are Affidavits on one Side, and no Affidavits on the other; and therefore the Fact must be taken for granted. Accordingly they made the Rule absolute.

Vide ante 88.

Anonymus.

The Time
which a Per-
son is allow-
ed to put in
his Traverse
to a Return
to a Manda-
mus.

A Return to a Mandamus having come in last Term to swear in an Officer of the Corporation of Limington, M. Strange moved, that the other Side might be obliged to put in their Traverses to this Return before the last Day of the Term, in order that he might have an Opportunity to move for a Trial at Bar. He said, upon these Returns the Party has it in his Power to traverse every distinct Fact of it; and he was informed, the other Side intended to do so in the present Case. For which Reason there would be a direct Necessity for trying this Cause at the Bar; but in order to prevent their doing this, the other Side has resolved not to put in their Traverse to it till the last Instant of the Term. He said, if his Motion could not be granted in this Way, he would desire to turn it another; and that was to move for a Trial at Bar now, though the Issue was not joined. He observed, that in Ejectments such Motions were frequent; yet there the Tenant may plead Ancient Demesne, or demur. But the Court said, that they could not restrain the Time, which the Law gave the Defendant to put his Traverse in. And as to the Case of the Ejectment, that was peculiar to itself. Accordingly both Parts of the Motion were refused.

The King and Franklyn.

Vide ante 88.

THE Chief Justice now delivered the Resolution of the Court. He said, they were unanimously of Opinion, that the Cause was tried by a Jury that had a Right to do it; and therefore the Verdict ought to stand. The Reason, upon which they had founded this Opinion, he declared, was, that the Case of special Juries was a Case intirely without Alteration made in it by the Act; and left as it was at Common Law. At Common Law there could have been no Occasion to have had a new Rule. The Rule does not give the Jury their Authority to try the Cause, but the Distringas; and besides there are no conditional Words in the Rule to confine the Time of Trial to the Sitzings after Trinity Term; for those Words *pro triatione*, &c. only shew, that the Intention of the Court was to try it then. He said farther, that they were of Opinion, no new Venire could have been in this Case. That the Statute of 7 & 8 W. 3. does not extend to this Case, was manifest. And by the Common Law before that Statute no new Venires went in Cases of this Nature. For these Reasons, he observed, it was clear, that the Exception taken by the Defendant was not good in Substance; and therefore there was no Occasion to determine, whether it could be taken in Point of Time. The Attorney General then prayed, that the Defendant might be committed. He said, he might have prayed this, when the Defendant made the Motion, which he did; and these Things have been allowed even at the Day of

Nisi prius; as the Chief Justice said, was done in the Case of *Mr. Bedford*. Accordingly the Court ordered the Defendant to be committed in the present Case. *Mr. Boodle* at the same Time said, that he had an Exception to offer in Arrest of Judgment, but desired Time till to Morrow for arguing it, in order that he might be the better prepared. To this the Attorney General observed, that the Defendant had a Right to offer what Exception he would in Arrest of Judgment, even at the Day the Judgment of the Court is prayed against him, and that after Judgment signed in the Office; which *Mr. Masterman* confirmed. For which Reason the Attorney General said, that he would have the Defendant brought up by Rule of Court to Morrow, and would then move for Judgment against him; and at the same Time the Defendant's Counsel might take their Exception. The next Day this was accordingly done. The Exception, taken by the Defendant's Counsel, was, that the Rule for the Special Jury ought to have been entered upon the Roll in the Nature of a Suggestion, to give Authority to the Awarding of this Special Distingas. The Words of the Act, they said, were general, that a Jury shall be returned according to the balloting Clause, unless in the Case of a Special Jury. This Jury therefore ought to have appeared upon the Record to have been a Special one, in order to have taken this Case out of the general Words in the Act. But as it stands upon the Record, this is just as every common Jury was before the Act. Records, they said, ought to be perfect in themselves; and every Fact, which is material to the Judgment, ought to be entered upon them. No Process can issue on a Record, but there must be an Award of it upon the Roll; a Day is given there for the Party's Appearance; the Death of one of the Party's is always there taken Notice of; in *Trespas quare vi & armis* an Entry is there made *quod nihil de fine, quia pardonatur*; in the Case of a *Tales* an Entry is there made, that it was *secundum formam Statuti*; of the awarding a *Nisi prius*, it is the same; and so in all Motions for pleading Double Notice is taken upon the Record, that this is done *cum Licentia Cur' secundum formam Statuti*. To this Purpose was cited *Yelv. 213. Brown. 114. 2 Cro. 207*. They observed farther, that the Case might have been, that there was no Rule for a Special Jury; if there had been none, they thought it would be very extraordinary to say, that this Judgment ought not to be reversed upon a Writ of Error. What Method then can be taken for the reversing such Judgment upon such an Exception? If this Method cannot, which is at present contended for, by appealing to the Record, whether there is such an Entry or not; it must be said, that this Matter shall be tried by Inspection of the Rule itself. But suppose there had been two Prosecutions against the present Defendant to have been tried the same Term, both by a Special Jury, and but one Jury should have happened to have been moved for. On the Assignment of such an Error the Rule of Court would be produced between The King and Franklyn; and no Averment could be had to determine in which of the Causes this Motion was made. The King's Counsel on the other Side answered, that the Act of Parliament

liament has appointed, that these Special Juries shall be granted upon Motion; for which Reason, if a Trial should be had by such a Jury without a Motion, an Application ought to have been made to the Court for setting aside the Trial for Irregularity. In the Common Pleas before this Act this was the constant Method of taking Advantage of such Exceptions; and undoubtedly this continues to be so at this Day. For which Reason it would be very strange to suppose, that the Legislature intended, that there should be a different Method of Proceeding in this respect in one Court from what there is in another; especially when the Act expressly declares, that the awarding Special Juries was a Thing doubtful in the Courts of Westminster-Hall; and makes no Difference between one Court and that of another. The Court declared their Opinions to be, that this Exception ought not to be allowed. The Reason, they said, which influenced them to over-rule the former Exception would likewise influence them to over-rule this; and that was, that the Case of Special Juries is in these respects intirely left as it was at Common Law. The Distinction therefore, which seemed to them obvious in Relation to Entries upon Records, was, between those Cases, which the Legislature allowed to continue unaltered, and those which the Legislature thought proper to alter; that, where the Legislature allows a Thing to continue as it was, there is no Occasion to take Notice of such Allowance by a *secundum formam Statuti*, though the Thing does appear upon the Record; but where the Legislature has made an Alteration, and that does appear upon the Record, there must be Notice taken of this Alteration upon the Record by a *Secundum formam Statuti*. Accordingly the Court gave Judgment for the King. Vide post.

The Bishop of London and The Mercers Company.

Vide ante 64.

THE Chief Justice delivered now the Resolution of the Court. He said, the Plaintiffs have set forth in their Declaration, that the Church of St. Mary Mildred and the Church of St. Mary Colechurch were ancient Churches within the City of London, and burn'd down by the great Fire. That there was an Act passed 22 Car. 2. for the uniting these Churches amongst others; by which it is provided, that the Patrons of that Church, which was of the greatest Value at the Time of the Act, shall first present, and so on alternately. That the King was Patron of the Church of St. Mary Mildred; and that the Mercers Company were Patrons of the Church of St. Mary Colechurch; and that the Church of St. Mary Mildred was of the greatest yearly Value. They then set forth, that at the Time of the Fire the Church in Question was full of one Richard Peringchief, Doctor of Divinity; that after the Act King Charles 2. presented to these two Churches Richard Peringchief; that the Churches became vacant by the Promotion of the said Richard Peringchief to a Bishoprick in the Time of King William; by Means of which King William granted them in Commendam to one Britton; that Britton died, by Reason of which

which it belonged to the Plaintiffs to present; and accordingly they did present one Martin, who afterwards resigned; that the late Queen presented one ^{who died;} and so it belongs to the Plaintiffs now to present. The Defendant Lewen by his Plea admits, that the Church was vacant at the Time King Charles 2. presented Dr. Peringchief, and that Dr. Peringchief was admitted, instituted and inducted; but insists that the Plaintiffs were Impropriators of the Church in Question at the Time of the Ad; absque hoc, that they were Patrons. And upon this Issue is joined. The Jury have found a Verdict for the Plaintiffs. Upon this Record, he observed, that the single Matter, now standing for the Opinion of the Court, was, whether the Objection, taken to the Form of the Declaration, was of such Weight, as by Means of it the Plaintiffs could not recover. The Objection, he said, was, that in the first place it is not set forth, that the Church was vacant at the Time King Charles presented; and in the next Place it is not averred, that the Presentee was admitted, instituted and inducted; so that what the King then did does not appear to be the satisfying his first Turn; and consequently he had a Right to present when the Plaintiffs first presented; which would alter the subsequent Turns likewise; for which Reason, it is urged, that the Plaintiffs have not a Right to this Presentation, but the King. And, he said, it must be agreed, that if no Regard was had to any other Part of the Record but the Declaration, the Objection would be fatal; but the Defendant has by his Plea admitted those Facts to be true, which the Plaintiff ought to have disclosed in his Declaration; and thereby the Defects in the Declaration are got over. He owned, there does seem to be Opinions in 5 Rep. 75. in 8 Rep. Dr. Bonham's Case, likewise in the same Report Turner's Case, that such Defects cannot be supplied. But in 1 Cro. 288. Sir William Jones 207. Sid. 184. and Lutw. 1492. the Law seems to be fully settled, that Defects in Substance may be supplied as well as others. Accordingly the Court affirmed the Judgment.

Halpen and Hatch.

UPON a Writ of Error on a Judgment by Default in the Common Pleas in an Action upon the Case for Words, the Error assigned was, that the Inquest upon the Writ of Inquiry had given the Plaintiff but 10s. Damages, and Costs 3s. 4d. yet he had taken Judgment for the Increase of Costs to 14l. Mr. Strange on the other Side said, that he did believe, this Judgment could not be maintained; but, though the Court might reverse the Judgment as to the Costs, yet he submitted it, they might affirm it as to the Damages; accordingly the Court were going to do so. But then he said, he did not know, but it might be more for the Plaintiff's Interest to have the Judgment reversed in the Whole, considering how scandalous the Words were, and how small the Damages for them; for which Reason the Court

How far the Court will reverse a Judgment in one part of it and affirm it in another.

gave him Time to speak with his Client. The next Term Mr. Strange consented, that the Judgment should be reversed in the Whole, which was accordingly done.

Chapman and Easton.

When an Issue is joined relating to another's Appearance, what shall be said to be a good Manner of Pleading in such sort of Cases.

UPON a Writ of Error on a Judgment in the Common Pleas in an Action upon a Bail-Bond, the Case appeared to be, that the Defendant's Plea was, that the Original Defendant appeared at the Day, in Pursuance of the Process, which was returnable Quinden' Pasch. The Plaintiff replied quod non habetur tale Recordum, & petit quod Recordum illud inspiciatur, without giving the Defendant Liberty to rejoin, quod habetur tale Recordum. Accordingly the Judgment was & super hoc inspectis Rotulis & Termino prædict', it appeared to the Court that there was no such Record; and therefore they gave Judgment for the Plaintiff. Mr. Parker now argued, that this Judgment ought to be reversed; in the first Place, because the Plaintiff has Issue joined too soon; and in the next Place, because on the Trial of this Issue the Court have inspected a wrong Roll. The Roll, which they ought to have inspected, was that of Easter Term; but no such Roll is mentioned in this Record; neither is any other mentioned, but that of Mich. Term, which this Action was first commenced in; so that the Termino prædict' can only relate to the Termino Michaelis. But the Court said, that the Original Action was commenced in the Common Pleas, as well as this upon the Bail-Bond; and therefore the Record appealed to was a Record of that Court where it was pleaded. For which Reason, they observed, that the Plaintiff had it in his Power to reply in the Manner which he did. And so, they said, this Point was settled in Carthew 517. Then as to the other Objection, they were of Opinion, that the Clause of super hoc visis, &c. was only a partial Reason of the Judgment, and might be rejected as Surplusage. Accordingly they affirmed the Judgment.

Munos and Wilson.

The Time for executing a Writ of Inquiry.

ON a Writ of Error upon a Judgment in the Court of Common Pleas, the Error assigned was, that the Writ of Inquiry was returnable Cras. Trin. which was of a Sunday, and executed on the Monday following. Mr. Strange said, that this was held to be wrong in Show. 16. Salk. 626. in the Case of The King and Gamley, Nat. Brev. 1. 26. and in the Case of Beech and Parker Nat. Brev. 3. 26. Accordingly the Court reversed the Judgment Nisi.

The King *and* Stephens.

ON Rule to shew Cause, why an Information should not be granted against the Defendant, for receiving a Bribe of 100 Pounds, to give his Vote as one M^r. Price should direct, him, in the Borough of New-Radnor; the State of the Case, as it appeared now before the Court, was, that one single Person made Affidavit, that the Defendant told him, that M^r. Price did give him such a Sum of Money for such a Purpose; and the Defendant made Affidavit, that he never did receive such a Sum, and M^r. Price, that he never gave him such a one. The Chief Justice, Judge Page, and Judge Probyn were of Opinion, that the Rule ought to be discharged, and the Party left to take his ordinary Remedy by way of Indictment. But Judge Lee was of Opinion that the Rule ought to be made absolute; because the Defendant has not denied that he ever told the other Person that he had such Bribe; for which Reason, he thought, that there was sufficient confessed to try this Fact in an Information. However, all the Court agreed in this, that if the Fact had been sworn by one single Evidence on one Side, and positively denied by the Party's Oath on the other, that no Information ought to go. Accordingly the Rule was discharged in the present Case.

How far the Court will not grant an Information for Bribery.

The King *and* Rose.

MR. Varney came now and said, that he had seen the Affidavits, which the Defendant had ready to produce to clear himself of the Charge that was laid against him, and he did own, they were sufficient for that Purpose. But still he hoped, the Inquisition should be quashed, for another Exception upon the Face of it, without going into that which had been before taken. The Exception, which he now relied upon, was, that the Jurors had not affixed their respective Seals to the Inquisition; but had only signed it. He said, that he did agree, he could not remember any Case, where an Inquisition has been quashed, because the Seals were not put to it; but this he remembered, that Judge Fortescue directed this to be done upon an Inquisition taken before him at Shrewsbury Assizes. And M^r. Reeves said, that he very well knew, that Orders for the binding out of Apprentices have been quashed in this Court; because they have not been under the Seals of the Justices. M^r. Fazacherley on the other Side said, that this Exception might equally be taken to every Inquisition upon a Writ of Inquiry; but he never knew such an Exception taken; and he has been informed, that those Inquisitions never are sealed. The Chief Justice said, that the Words of every Writ of Inquiry are sub sigillo & sigillis; but if the Precedents have always been not to seal them, he should not be for overturning them. However, this was thought to be a proper Exception to be farther considered of; and therefore the Matter was ordered to stand over. Vide Post.

Vide ante 82.

The

The King *and* The Inhabitants of Drakemast.

Vide ante 99.

MR. Abney came now to shew Cause, and said, that if this Assessment was removed up, it was clear this Court could not inquire into the Irregularity of it by Affidavits; that Inequality is to be inquired into at the Sessions; and therefore the Assessment may be set aside in the whole or in Part, and even a new one made according to the Discretion of the Justices. The only Reason therefore, that can be given for removing up this Assessment by Certiorari, is, that it may be relieved against in this Court, if any Errors should appear upon the Face of it. But that he observed, may equally be done in an Action of Trespass or Replevin; and the Parties have actually taken this Method, and the Matter is to be tried the next Assizes. He said farther, that he apprehended no Certiorari could lie in this Case by Law. The Assessment is never lodged at the Sessions; it is only produced in Evidence there, and is exactly like other Pieces of Evidence; for Notice is constantly given to the Overseers to produce it. As soon as the Trial is over, the Overseers constantly take it back with them; for which Reason he submitted it, it was impossible for the Justices of the Sessions to send it up. M^r. Fazacherley on the other Side said, that whatever may be the Practice at the Sessions, of allowing the Overseers to take their Assessment back with them, yet still he submitted, that if a Certiorari should go to remove this Assessment, it would be a Contempt in the Overseers to withhold the Assessment after that, and this Court might punish them accordingly. Undoubtedly therefore this Court might enforce their Certiorari. For which Reason the only Question was, whether the Certiorari was proper to be awarded in the present Case. He said, if it was not, he could not apprehend that this Court could properly make any Determination, whether the Justices at the Sessions have done right in their Determination. The Determination of the Justices is founded upon the Assessment; the Assessment therefore must be produced before this Court can judge whether such Determination is right or not. He did agree, that this Court could not inquire into the Merits of the Assessment in Point of Fact; but many Causes there are, which might make the Assessment bad upon the Face of it. If there are such Causes, it is fit the Assessment should be quashed; if there are not, it is fit it should be confirmed, and then there will be a very speedy Remedy for enforcing the Payment of this Rate, viz. by Attachment; which is the Case of Orders of Bastardy, when they are confirmed here. And he observed, that a Certiorari did issue out of this Court to remove up such Assessment, Mich. 9 Ann. in the Case of The Town of Marlborough. In that Certiorari there were the very Words omnes & singulas ratas; that Certiorari was afterwards returned and filed; and was now produced in Court. The Chief Justice said, that undoubtedly this Court were not Judges of such Inequality of a Rate, as arises from Matters out of the Rate; but they were the proper Judges of every Thing making the Rate bad, which arises upon the Face of it.

And he remembred a Rate out of Suffolk was quashed in Lord Holt's Time; because it appeared upon the Face of it, that a Tenant was taxed for his Stock upon the Land. For which Reason, he was of Opinion that the Assessment ought to be returned. Judge Page and Judge Probyn agreed the same. But Judge Lee doubted; accordingly this Matter was ordered to stand over. Vide Post.

Burrey and Perrey.

Sejeant Belfield now moved, that the Rule might be absolute; and cited the Case of Philips and Fish, Trin. 1726. The Words there were, He has stole my Hens, which were clearly actionable; special Damage found, and the Plaintiff had his full Costs. Mr. Hussey on the other Side said, that there might be some Pretence to allow the Plaintiff full Costs, where the Words are not actionable, and the Action brought for special Damage; because that is upon the Matter a special Action upon the Case; and cannot properly be called an Action for Words. But where the Words are actionable, and the Damages laid only by way of Aggravation, he submitted it, that that could only be an Action for Words; and consequently fell within the Words of the Act of Parliament. The Question therefore for the Consideration of the Court only was, whether the present Words were actionable or not. He said, he would repeat them exactly as they are laid in the Record. He went up to the Widow Fowler's, and put on a Lock, and at Night broke open the House, Innuendo, Burglariter, and Mrs. Fowler catched him; and his Wife and his Man went up to the Widow Fowler's, and sent to Mr. Brathwait the Ironmonger, and three Persons were there, and down'd upon their Knees, because she shou'd not prosecute him, and Mr. Brathwait paid six or seven Pounds to make it up. He submitted it, that these Words were clearly actionable; and besides the Case cited by him on the former Motion of Button and Hayward, he took it, the Case of Ward and Reynolds, Pas. 3 Ann. was a full Proof of it. The Words there were, How did your Husband die? The Answer was, As you may do; No, said the Defendant, of the Wound which you gave him. The Chief Justice said, that in the Case of Philips and Fish before cited, he well remembred, that what is now stated as special Damage in that Case was really a distinct Cause of Action, and laid as a second Count; and not by way of Aggravation; for which Reason he did not think that Case came up to the present one. On the other Side, he said, he did think that the Burglariter in the Innuendo could not make the Words actionable, if they were not so without it. However, the Court thought this a Matter proper to be farther considered of. Vide Post.

Anonymus.

How far Notice is necessary to be given to the Attorney General.

MR. Kettleby moved for a Habeas Corpus to be directed to the Warden of the Fleet, to bring up the Body of a Prisoner, who was in Execution at the King's Suit, in order that he might be charged with an Indictment of Battery. The Court said, they never grant these Motions without Notice given to the Attorney General, even in the Case where Bail would surrender a Prisoner. They observed, that there was an ordinary Remedy, which the Party had, viz. to outlaw the Prisoner; and therefore they refused to grant the present Motion, till Notice.

The King and Knut.

What shall be said to be a Libel upon a Company.

Motion was made for an Information for publishing a Libel upon York-Buildings Company, in an Advertisement put into the Daily Post on Tuesday the 8th of February, by charging the Company with raising the Value of their Stock, by getting 100000 Pounds under the Credit of their Seal. Accordingly a Rule was made to shew Cause.

Jackson and Shepherd

How far a Statute shall be said to extend to inferior Courts.

Serjeant Chapel moved to make a Rule absolute against the Bailiffs of Exeter, for discharging poor Prisoners, that were in Execution for Debt under 100 Pounds, in Pursuance of the late Act of Parliament. The Counsel of the other Side insisted, that that Statute did not extend to inferior Jurisdictions. But the Court was of Opinion, that it did; accordingly made the Rule absolute.

Atesley and Bell.

When a Rule is made only in general, for the Inspection of publick Books, what shall not be said to be a Breach of it.

ON Rule to shew Cause, why an Attachment should not be granted against the Defendant, for not allowing the Plaintiff to take Copies of certain Poll-Books made at an Election of an Officer in the City of Norwich, in Pursuance of a Rule of Court made for inspecting all publick Books. Mr. Masterman said, that there ought to have been a particular Rule for inspecting the Poll-Books; and so it was resolved in Brocas's Case, and likewise in the Case of Sir Peter Delmee. Accordingly the Rule was discharged.

The King and The Inhabitants of Hornbey.

ON Rule to shew Cause, why an Order of Sessions, discharging an Order of two Justices for the Removal of one Martha D'Anvers from the Parish Carleton to the Parish of Hornbey, should not be quashed; the Fact stated by the Order appeared to be, that one Finetta Pinet made her Will, and thereby gave 30 Pounds for the binding out such poor Persons Apprentices in the Parish of Hornbey, as her Executor, together with the Minister, Churchwardens and Overseers, should appoint; that Martha D'Anvers was bound out Apprentice in this Parish, with this 30 Pounds; that neither the Executor of Finetta Pinet, nor the Minister of the Parish were Parties to the Indenture, nor did Martha D'Anvers execute the same; but that the Churchwardens and Overseers, with two Justices of the Peace, were Parties to it, and that Martha D'Anvers lived in the Parish of Hornbey six Months accordingly. Upon this State of the Case the Counsel said, that they apprehended the Justices at the Sessions were clearly right in discharging the Order. They observed, that it must undoubtedly be admitted, even by the other Side, that Martha D'Anvers cannot possibly have gained a Settlement by any thing that has been done, unless some Statute will warrant it. The two most material Statutes, for this Purpose are 43 Eliz. 2. (5) and 7 Jac. 1. 3. But the Statute of Eliz. requires, that the two Justices, binding the Children out, should be of the Quorum; and likewise that Male Children shall be bound out till the Age of twenty-four, and Female Children till the Age of twenty-one, or Marriage; nothing of which appears to have been in the present Case; and therefore the present Case cannot at all come within the Relief of that Statute. Then as to the Statute of Jac. that requires that no Person bound out in Pursuance of that Act, shall be above the Age of fifteen; which does not appear to be the Case of the present Person removed; for which Reason that Statute cannot be material neither. They took Notice likewise, that Martha D'Anvers ought to have executed this Indenture. And this they observed was the Case of every Infant that is bound an Apprentice, according to the Custom of the City of London; the Infant in that Case always executes the Indenture. For which Reasons they apprehended, that the Settlement of Martha D'Anvers in the Parish of Hornbey, could by no Means be maintained. The Counsel on the other Side said, that they did agree that Martha D'Anvers was no Party to the Indenture; but they submitted it, that it was not material that she should be; and that the Case of the Infant, according to the Custom of the City of London, was a Case peculiar to itself; and therefore could not influence the present one. They did agree farther, that it was not expressly mentioned in the Indenture, that if she married before the Age of twenty-one, the Apprenticeship should determine; but they observed, that the Law implies that; and therefore such Clause would have been immaterial. Then as to the other Objections that were made, they observed, that the Truth of the Fact was with them,

How far a Person gains a Settlement, or not, by living in a Parish as an Apprentice.

them, and appeared so to the Justices of the Sessions, though the Justices have not stated the Fact so upon their Order. For which Reason they prayed, that they might be at Liberty to apply to the Justices to amend their Return; which the Court accordingly granted; so the Matter was ordered to stand over. Vide Post.

Molden and Sir William Stanhope.

What shall
be said to be
a good Testa-
tatum fieri
facias.

ON Rule to shew Cause why an Execution should not be set aside for Irregularity, *M^r. Strange* and *M^r. Timothy Barnardiston* said, that the Fact was, that this Action was tried at the last Day of Sittings in Mich. Term last, which was on Friday the 26th of Nov. the next Day the Distringas was returnable, and a Rule given likewise on the Postea for signing Judgment, which was out the 2d of Dec. and then the Plaintiff signed his Judgment; and took out a Fieri facias directed to the Sheriff of Middlesex, tested the 27th and returnable the last Day of the Term, which was the 29th, and at the same Time took out a Testatum fieri facias, tested the last Day of that Term, returnable the first Return of this; which was executed in the Vacation. They said, that they submitted it, this Execution was clearly regular; for that it was determined in the Case of *Loving and Avery*, Trin. 12 Geo. 1. that the Original Fieri facias and the Testatum may be sued out both at the same Time; and they apprehended, that there was no certain Time required between the Teste and Return of the Original Fieri facias. *M^r. Reeves* and *M^r. Fazakerly* argued on the other Side, and submitted it, that before the Plaintiff can be intitled to complete Judgment, Costs must be taxed; for which Reason they said the Judgment could only relate to the last Day of the Term. They did agree however, that notwithstanding this, the Plaintiff might have sued out an Elegit, tested the last Day of the Term, and returnable the first Return of this; so that he might have had in that Way Execution in the Vacation. But in this Way of Proceeding, the Original Fieri facias could be tested but the last Day of the Term, and returnable the first Return of this; so that they apprehended the Testatum was irregular. The Court said, that their Opinion was, that the Original Fieri facias was well tested the 27th, and well returnable the 29th; so that there was a good Warrant for the Testatum. They were farther of Opinion, that the Original one and the Testatum were well taken out together. For which Reason they held the Execution to be regular. Accordingly discharged the Rule.

The King and Franklyn.

THE Attorney General prayed now the Judgment of the Court against the Prisoner. Accordingly the Information was read; which charged him with publishing a Libel against the present Ministry, in a Paper called the Hague Letter, in one of the Craftsman. And then Judge Page pronounced the Judgment of the Court to be, that he should pay 100 l. Fine, be imprisoned for one Year, and until he should pay the said Fine, and likewise till he should find Sureties for his good Behaviour for seven Years, himself to be bound in a Recognizance of 1000 l. and his Sureties in a Recognizance of 500 l. Vide ante 95.

Catherol and Cowper.

THIS Matter now coming on again upon the Rule that was made to shew Cause, Mr. Abney said, that he had looked a little farther into the Method, which he proposed, for the Defendant's having his treble Costs, and was satisfied that that Method was well warranted by the Practice of the Court. He took Notice, that in the Case of *The King and Poland*, there was a Case cited, where an *Indebitatus Assumpsit* had been brought against a Collector of the Land-Tax; the Defendant had a *Verdict*; but because it did not appear upon the *Nisi prius* Roll, that this Action was brought against an Officer, Motion was made, that this might be entered upon the the Roll to intitle the Defendant to treble Costs; accordingly the Court ordered an Entry to be made in this Manner; *super examinatione* *Materiae* it appeareth to the Court, that the Action was brought against the Defendant as Collector; *Ideo consideratum est*, that he shall have his treble Costs. This Precedent having been cited to the Court in the Case of *The King and Poland*, the Court made the same Rule, that the like Entry should be made in that Case. He observed farther, that in the Case of *one Walker and Sir William Egerton*, Hil. 7 W. 3. the like Entry was made upon the Roll. Accordingly the Court ordered the same to be done in the present Case. Upon which Mr. Fazakerly said, that then the Plaintiff must have Liberty to plead to this Suggestion, or to demur. The Court agreed that in the Case of a common Suggestion the Party has a Right to plead or to demur to it; but the present Suggestion is made by Order of the Court upon the Examination of the Matter between the Parties; for which Reason they were of Opinion, that it was conclusive.

Evelyn and Evelyn.

The Manner Canc.
of raising
Portions.

THIS was a Cause, that came on now for the Judgment of the Court. The principal Question in the Case was, Whether 8000 l. which were the Portions of younger Children, should be raised by Sale of a Term directly, or by the Annual growing Profits? The Difficulty of this Question arose upon the Words of a Settlement, wherein the Father of the Plaintiff was made Tenant for Life, with a Power given to certain Trustees to make Lease or Leases for any Number of Years, without Impeachment of Waste for the raising these Portions to the younger Children; the Remainder of this Estate was limited to the Defendant. The Plaintiff now brought her Bill against the Defendant in order to have a Sale of the Term so raised. And upon this Question the Lord Chancellor, with the Assistance of Lord Raymond and Master of the Rolls, delivered their Opinions. The Rule which they in general seemed to agree upon was, that where the Words of a Settlement are not so express, but what a Court of Equity may put a Construction upon them, the Construction, which a Court of Equity will put upon them is, that the Term shall be sold directly, wherever the Portions are vested in the Children at a Day certain; but a Term shall not be sold directly, wherever no such Day is certain. This was the Rule, which the Court laid down for their Construction, when the Words are not so strict but they may put one upon them; but they seemed to agree on the other hand, that though the Portion should be vested at a Day certain, the Words of the Party might be so strong, as to confine the Payment of it to that Manner of doing it only; viz. by the growing Profits. Accordingly in the present Case, as there was no fix'd Time mentioned in the Settlement for the vesting of these Portions in the Children, the Court dismiss'd the Bill. *Ex relatu.*

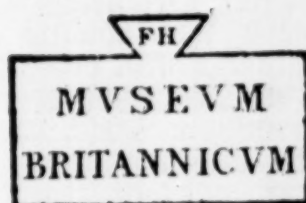
Brown & al' and Langley & al'.

Before the Master of the Rolls, Tuesday Feb. 29, 1731.

How far Pa-
rol Evidence
shall explain
a Will.

THIS was a Bill brought by the Plaintiffs as next of Kin to the Deceased against the Defendants as Executors, in order to have a Distribution of the Residuum of the Personal Estate amongst them. The Defendants set forth in their Answer, a Clause of the Will, whereby the Testator gave the Residuum of this Estate to the Poor of the Parish of Kettering in the County of Lincoln. Upon this the Parties joined in Commission. And now the Fact disclosed upon the Commission, and stated by Mr. Wills, as Counsel for the Defendants, was, that this Parish of Kettering was not in the County of Lincoln, but in the County of Northampton; and likewise that the Testa-

to; really thought, that this Residuum of the personal Estate would not amount to above 10l. and that he declared so at the Time of making his Will, whereas in Truth it amounted to near 1000l. Upon which Mr. Wills submitted it, that the Parish could not claim any Thing under this Will; but if it could, at least not above what the Testator thought the Residuum would amount to. But the Master of the Rolls declared his Opinion to be, that Parol Evidence ought to be admitted to help out the Description of the Parish in this Case; and that this was a settled Rule in Equity. For which Reason he was of Opinion, that the Parish of Kettering in the County of Northampton, were well intitled under this Will; but he was of Opinion, that no Parol Evidence ought to be admitted in Relation to the Quantity of the Thing devised; and therefore he thought the Parish well intitled to the whole. Accordingly dismissed the Bill. Ex relatu.



Lent

Lent-Assises.

5 Geo. II. 1731-2.

Baynes and Reeves.

How far a Title is not proper to be given in Evidence in an Action of Trespass.

IN an Action of Trespass brought for disturbing a Man in his Freehold, the Defendant gave the best Evidence he was able, that he was actually in Possession at the Time of the Trespass supposed, and had been so for seven or eight Years. But his Evidence not being sufficient for that Purpose, he offered to prove a Title. The Plaintiff's Counsel objected, that a Title was not proper to be inquired into in an Action of this Sort; and said, that Lord Chief Baron Pengelly refused once to allow it in this Circuit. But Mr. Baron Commyns, who was the Judge that tried the Cause, did allow it; and declared, that any Possession longer than seven or eight Years would be Evidence of it.

The Bailiffs, Burgesses and Commonalty of the Town or Borough of Ipswich *ver.* Johnson.

How far a Corporation will not be intitled to exclude Foreigners from setting up a Trade amongst them.

IN an Action upon the Case the Plaintiffs declared, that the Town of Ipswich was a Borough by Prescription, and that during all the said Time the Burgesses of the said Town were an Incorporation, and for many Years last past had been Incorporated by the Name of the Bailiffs, Burgesses and Commonalty of the Town or Borough of Ipswich. That within the said Borough there has been an antient and laudable Custom, viz. that no Foreigner, not being Free of the said Borough, shall keep any Shop within the said Borough, Town or Liberties thereof, without a Licence from the said Corporation. Nevertheless that the Defendant, not being ignorant of the Premises, did keep a Shop there, being a Foreigner, and without any Licence. To this the Defendant pleaded Not guilty. And now upon Evidence the Plaintiff's Counsel offered to prove that there had been very antiently Courts held within the Borough before the Bailiffs; and this they submitted it, was an Evidence of the Borough's being very antiently a Corporation. But Mr. Baron Commyns was of Opinion, that it was none; because a Borough is of itself capable of holding Courts; and therefore that Evidence was not allowed. The Counsel

for the Plaintiff then said, that they would prove, that very antiently the Borough enjoyed the Lands, which, they submitted it, was a full Evidence of the Borough's being at that Time a Corporation; and that Evidence the Court allowed. To encounter this Evidence, the Counsel for the Defendant said, that they would prove, that there was a Time when there was no Seal in this Borough; and that would be Evidence, that at that Time there was no Corporation in it. They said farther, that the Corporation was created by Charter of 6 John; and relied upon these Words in it, *Burgenses habeant Guildam Mercatoriam*. The Judge was of Opinion, that these Words antiently would create a Corporation; and for that Purpose said there was an Authority in Roll's Abridgment. The Counsel for the Plaintiff then went into their Evidence to prove the Name of the Corporation. For this Purpose they produced a Recital of a Charter made in Edward the Fourth's Time; by which the Burgesses were incorporated by the Name of the Bailiffs, Burgesses and Commonalty of the Town of Ipswich. The Defendant's Counsel objected, that this would not prove the Name of the Corporation, as laid in the Declaration. They did agree, that such Variance would not have been material in any Action brought against the Corporation; but in every Action brought by them, they must prove the Name strictly as they have laid it. For this Purpose was cited a Case out of Bro. Ab. But the Court was of a different Opinion, and cited *D. Ayrey's Case* 11 Rep. The last Thing endeavoured to be proved by the Plaintiff, was their Custom. In order to do that, much written Evidence was produced, and one living one. The living Evidence owned, that he never knew Butchers pay Foreign Fine Money, neither did he ever know any Foreigner pay it, living within the Liberty and out of the Borough; and that Freeman's Widows were always thought to be exempted, during their Widowhood. The Judge said, that he thought these would be pretty material Exceptions against the Custom, as laid in the Declaration. But what was the great Difficulty with him was, whether any of the written Evidence had proved the Plaintiff's Custom. The Proof, he said, was beyond Contradiction, that the Foreigners have been for a long Time past fined for keeping Shop without a Licence; and that he agreed was very strong Evidence, that the Corporation had a Right to those Fines. An Action of Debt therefore he thought might be well maintained for them. But the Doubt with him was, whether this Evidence would amount to a Proof, that the Corporation might totally exclude Foreigners from erecting Shops arbitrarily at their own Discretion. He said farther, that he was far from being clear, that the Custom, as laid in the Declaration, was good in Point of Law. But that Question was unnecessary to be argued now; because his Opinion was, that the Evidence did not maintain it. Accordingly the Plaintiff's Counsel agreed to be nonsuited.

Term. Pasch.

5 Geo. II. 1732.

Perry and Cortesoes.

What shall
be said to be
a good No-
tice of exe-
cuting a Writ
of Inquiry
before a
Judge.

ON Motion to set aside a Writ of Inquiry, M^r. Fazakerly said, the Fact was, that the Plaintiff gave Notice for executing it before the Sheriffs of London and Middlesex on the 17th Day of February last; but the Day after that he had given this Notice he had obtained a Rule for shewing Cause why the Writ of Inquiry should not be executed before a Judge, and that Rule he did not serve up on the Defendant till two a Clock on the last Day of last Term, which was the 12th of February, and the last Motion, which was made that Day, was, that that Rule might be made absolute, which, not being opposed, the Court granted accordingly. On the Tuesday after, being the 15th the Plaintiff gave the Defendant Notice, that this Writ of Inquiry would be executed before the Chief Justice on the Tuesday then following, which the Plaintiff did execute in Pursuance of his Notice, and the Defendant made no Defence. Upon this State of the Case M^r. Fazakerly submitted it, that the Plaintiff was irregular in two Respects, first, in getting the Rule made absolute the last Day of the Term, whereas the Rule to shew Cause was served but at Two a Clock that Day; and in the next Place, because there were not eight Days Notice of the Writ of Inquiry being executed before the Judge; for one of the Days were not taken exclusive, which must be done in all these Computations. As to the first Point, the Court declared their Opinions to be, that the Rule was regularly made absolute; because they could not see, that any probable Cause could have been shewn to have prevented the Rules being made absolute. For which Reason, they said, this was not like the Case of moving to put off a Trial the last Day of a Term; there indeed they did agree the Party must always have a reasonable Time for shewing Cause; because otherwise he may be greatly damaged. And besides in the present Case they observed, that the Defendant did not so much as come and pray, that the Time might be enlarged for his shewing Cause. Then as to the second Point, they said, that no Day is

ever

ever fix'd in the Notice for executing these Writs of Inquiry before a Judge, the Notice is only in general given, that the Writ of Inquiry will be executed before a Judge at theittings: but the Day for executing it is always left to the Judge's Discretion; and for the same Reason the Hour of the Day neither is ever mentioned in these Notices. They observed farther, that as this Writ of Inquiry before the Judge was executed after the Day which the Notice was given on for executing it before the Sheriff, the Defendant could be at no Prejudice; and therefore they should have been of Opinion, that if the Defendant had but two Days Notice, it would have been sufficient. Accordingly the Motion was refused.

The King and Toms.

ON Motion for a new Trial in an Information for a Nuisance, by digging a Ditch cross a Turn-pike Road, Mr. Abney said, that the Information set forth, that Time out of Mind there had been a Way for Coaches, Carts and Carriages, leading from Morton-Hindmost to the Town of Woodstock, and that by Act of Parliament there had been a Turn-pike created upon this Way which the Defendant dug a Ditch cross. Upon this Information the Defendant was convicted. But Mr. Abney submitted it in the first place, that no Prescription could be laid for a Way for Coaches, because Coaches are but of a Modern Invention. He said farther, that it appeared upon the Evidence, that there was no such Town in England as Woodstock, but only Old Woodstock and New Woodstock; and that the Place intended was New Woodstock. He took Notice likewise, that no proper Evidence was given of this being such a Way for Carriages as is described in the Information; for the Evidence, he said, only was of a certain Person, that had seen Carriages driven sometimes upon one Part of the Way, sometimes upon another; whereas Evidence ought to have been produced of Persons, that had actually drove these Carriages over the Whole of it. But the Court declared their Opinion as to the first Point, that the Prescription set forth in the Information was a good Prescription; for they thought, that a Prescription for Carriages in general would be a Prescription for Coaches as well as other sort of Carriages, though Coaches are but a new sort of Carriages; and therefore the Information might well set forth the Prescription to be for a Way for these sort of Carriages as well as others. To the second Point they said, that a Town may have various Names, and they thought it a Matter proper to be left to a Jury, whether the Town in Question was not known by the Name of Woodstock as well as New Woodstock; and so Judge Page, who tried the Cause, said, that he directed the Jury. And as to the last Point, Judge Page said, that Evidence was given by one, that lived upon the Road between Morton-Hindmost and Woodstock, that he had seen Carriages drove from Morton-Hindmost to his House, and the next Morning set out from

What shall
be said to be
a good Pre-
scription for
a Way.

from his House and drove to Woodstock, which the Court thought undeniable Evidence. Judge Page said likewise, that there was indeed one Objection taken by the Defendant's Counsel at the Trial, which he allowed them, and that was, that the Prosecutor would have given in Evidence a printed Paper of an Act of Parliament relating to this Turnpike; but the Act was not printed by the King's Printer; and for that Reason he would not allow it to be read. But the Act, he observed, was a publick Act, made to be so by the Parliament; and therefore there was no Occasion for producing it. The Chief Justice too declared his Opinion to be, that that was a good Objection to the Reading the Act. Upon the Whole the Court refused the Motion.

Loseild and Bankcroft.

Vide ante 40.

MR. Strange now moved for Judgment for the Plaintiff. He did agree, that the Exception taken on account of its not being laid in the Declaration, that the Words were related of the Plaintiff, must be fatal. But still, he hoped, there would be enough upon this Record to intitle the Plaintiff to his Judgment. He said, there were several Counts in the Declaration, in three of which the Words are laid over various Ways; and then the Declaration charges, that the Defendant wilfully and maliciously intending to charge the Plaintiff with Felony on such a Day and Year *crimen felonix ei imposuit, & Postea eodem die & anno* the Defendant took up the Plaintiff and carried him before my Lord Mayor, charged him there with the Felony, and my Lord Mayor discharged him. The Jury upon this have given a Verdict for the Plaintiff as to the two last Counts, and acquitted the Defendant as to the others. So that, he said, the single Question, which he should offer to the Court, was, whether, besides the three Counts for the Words, there are not two other Counts; and if so, the Plaintiff will be well intitled to his Judgment. Now as to that he submitted it, that the Words *crimen Felonix ei imposuit* made one Count, and the Words *Et Postea, &c.* made the other. The Words *Et Postea, &c.* contain a Charge of itself, which will well support an Action; and therefore that may well be considered as one Count intirely independent of the former. However upon looking upon the *Postea* it appeared, that the Jury had expressly found the Defendant guilty as to one of the Counts for the Words; and therefore Mr. Strange agreed, that the Judgment should be arrested, which was accordingly done.

Harris and Myers.

ON Motion to set aside a Verdict, Mr. Agar said, that in Michaelmas Vacation the Defendant received Notice of Trial for the first Sitting in Hill. Term, which was the 1st Day of Feb. but on that Day received a Countermand, with a Continuance of the Notice of Trial for the second Sitting, which was of the 7th of Feb. On the 5th he received another Countermand, with a Continuance for the last Sitting, which was on the 10th. On the 9th he received a Countermand for that likewise, with a Continuance for the Sitting after Term; and then the Plaintiff brought on the Cause, and the Defendant made no Defence. Accordingly the Court made a Rule to shew Cause, and afterwards made it absolute.

What shall not be said to be a good Notice of Trial.

Winter and Morehand.

MR. Denison moved on the Part of the Defendant, that the Plaintiff might be obliged to make up his Declaration with a special Memorandum of the last Day of Hill. Term, and not generally of Hill. Term, as otherwise he would do. For the Plaintiff, he said, did not sue out his Bill of Middlesex, till the 9th of Feb. returnable the last Day of that Term; and in fact, the Defendant had tendered the Plaintiff his Money, before the suing out of his Writ. But if the Memorandum was made up of Hil. Term generally, the Defendant would not be able to have the Benefit of his Tender. Accordingly the Court made a Rule to shew Cause. Vide Post.

How far the Court will require a Plaintiff to make up his Declaration with a special Memorandum.

Lomax and Holden.

AN Issue out of Chancery being to be tried at the Bar this Term, Lord Chancellor directed that the Plaintiff and Defendant both should move this Court, that the Issue might be changed, and tried in a feigned Action, which the Parties accordingly did. But the Court said, that it was against their Rules to allow a Trial at Bar to be moved for before Issue joined. Accordingly they refused the Motion. Vide Post.

How far a Trial at Bar cannot be moved for, till Issue is joined.

The King and The Inhabitants of Drakemast.

THIS Matter coming on again, Judge Lee said, that he had looked into his Notes of the Case before cited of the Town of Marlborough. The Dispute, he observed, there was about a Poor's Rate made upon St. Mary's Parish, within that Corporation. He did agree, that the Certiorari was granted in that Case; but afterwards, upon Motion, the Rule for granting the Certiorari was discharged. And the Reason given by the Court in that Case was, that the Poor might greatly suffer for want

Vide ante 99.

of a Maintenance, if these Rates should be removed. For which Reason the Court observed there, that the Parties ought to be left to their ordinary Remedy, in Case a Distress is made for the Rate. Accordingly the Court was of the same Opinion in the present Case; and the Rule for shewing Cause was discharged. Vide Post.

Blakeman and Goff.

How far the Court will not grant a second Certiorari, by reason that it is moved for with an Intent to reverse a Judgment.

ON Rule to shew Cause, why a Certiorari should not be quashed for its being tested Roberto Eyre, whereas it should have been Roberto Raymond, Mr. Fazakerly submitted it, that the Certiorari might be amended; but Mr. Parker observed on the other Side, that it could not, because the Fault was in the Certe of the Writ, and for this Purpose cited 1 Lev. 2. Accordingly the Court was of the same Opinion; upon which Mr. Fazakerly moved for a new Certiorari. But the Court said, it is well known, that the Party is never intitled to a second Certiorari; and in the present Case the Design of this Certiorari was to reverse a Judgment; for which Reason they declared, they would not grant a second to inform their Consciences, as they sometimes do. And Lord Raymond observed, that in the Case of Ward and Stokoe Lord Chief Justice Holt refused to amend a Writ of Error singly for that Reason, because it was to reverse a Judgment; accordingly the Rule was made absolute.

Jones and Doe.

How far an Ejectment will not lie in the Courts of Westminster Hall, for Lands in a County Palatine.

Vide Vol. 1. 365.

IN Ejectment brought in this Court for Lands lying in the County Palatine of Lancaster, Mr. Reeves moved for Liberty to plead to the Jurisdiction of the Court. He apprehended, he said, that such Motion was necessary; because in Ejectments the Defendant can plead nothing but the General Issue, without Leave of the Court, not even the Plea of Antient Demesne. And he submitted it, that the Court would grant it, because he conceived the Court had granted the like Motion in the Case of Thrustout and Holdfast, Trin. 3 G. 2. Such Plea too was actually put in in that Case, in Pursuance of it, and the Parties rested under it. In order then to shew that the Lands in Question lay in the County Palatine, he produced the Declaration, by which they were described to lie in Com' Lanc'. Judge Page doubted, whether the producing such Declaration was sufficient without an Affidavit to verify that the Lands lay within the County Palatine. He did agree, that all the Lands that were Part of the County of Lancaster, in Edward the Fourth's Time, were made Part of the County Palatine; but it did not appear to him, but there might be other Lands added to the County since, which would not be Part of the County Palatine; for which Reason he thought it requisite, that an Affidavit should be made, that these Lands were Part of the County Palatine. The Chief Justice said, that after the Tenant has entered into the Rule to confess Lease, Entry and Duster, he did agree, the Tenant could plead

no Plea but the General Issue, without Leave of the Court, but as he had not done that yet, he could not see but that the Tenant might plead what Plea he should be advised to. And in the Case of Thrustout and Holdfast he doubted, whether the Court said any Thing more, than let the Party plead as he shall be advised. Accordingly the Court thought that the Rule made in that Case ought to be looked for; and in the mean Time made a Rule to shew Cause. But a few Days after the Plaintiff discontinued, on Payment of Costs.

Machin and Elliot.

THE Defendant and another had been Security for one Lanman, a Prisoner in the King's Bench at the Time when Machin was Marshal, in order for Lanman's having the Benefit of the Rules. And for that Purpose the Defendant gave a Warrant of Attorney to confess a Judgment to Machin; accordingly the last Day in Hil. Term last, the Court upon Motion, made a Rule for entering up Judgment upon it. Three Days after Term the Plaintiff signed his Judgment; and in the Execution took the Defendant in Execution, by a Testatum Capias, notwithstanding at that Time no Capias into Middlesex had been sued out, though now indeed such a one was produced. Mr. Ketelby upon this moved, that the Execution might be set aside; and insisted, that as he had a Rule of Court to produce, by which it appeared, that the Judgment could not be entered up till the last Day of Hil. Term, the Judgment that was entered up in Pursuance of it, could by no Means relate to the first Day of that Term, as in other Cases it does; for that would be to aver against the Records of the Court. For which Reason he submitted it, that the Capias into Middlesex could only have been tested the last Day of that Term, returnable the first of this, in order to found the Testatum upon it. But besides, he observed that in Fact there was no Capias into Middlesex at all taken out to found the Testatum upon at the Time of the Execution, and that, he submitted it, was another Irregularity. But the Court were of Opinion, as to the first Point, that this Rule of Court could not alter the general Notions of Law, of all Judgments relating to the first Day of the Term; for which Reason they were of Opinion that the Capias in London, bearing Teste the first Day of that Term, returnable the last, was regular enough. And as to the Time of suing out that Capias, they said, they would not inquire into it; a regular Capias into Middlesex was produced before them, and they would not examine into the Time of obtaining it. In the Common Pleas they said, it was well known, that the Original is often sued out after the Writ of Error brought. Accordingly the Court refused the Motion.

How far a Judgment shall be said to relate to the first Day of the Term.

What shall be said to be a good Testatum Capias.

The King and Lofeild.

How far the Court will grant an Information for a Libel, and will not leave the Party to take his Remedy by way of Indictment.

Vide ante Vol. 1. 13.

ON Rule to shew Cause, why an Information should not be granted against the Defendant for a Libel, Mr. Fazakerly said, that the Fact was, that the Defendant had brought an Action against one Bankcroft, for maliciously causing it to be printed in the News that he was guilty of Felony, and for procuring him to be carried before the Lord Mayor of London on the Suspicion of it. In that Action the present Defendant recovered 1100 l. Damages; and upon this he put it into the News, That Bankcroft had conspired to charge him with this Felony, that in Vindication of his Character he had brought an Action against Bankcroft for so doing, and had recovered 1100 l. Damages against him. Mr. Fazakerly observed, that every Word contained in this Advertisement was true; and though the Truth of it could not be justified upon pleading, yet he submitted it, that it was a Reason why the Court should not interpose, but leave the Party to his ordinary Remedy. Accordingly Mr. Strange, who was of the same Side, observed, that the Court was of this Opinion in the Case of The King and Bickerton, cited in the Case of The King and Dormer, Easter 1727. But Mr. Fazakerly carried it even farther, and submitted it, that the Advertisement was no Libel at all, nor punishable in any Manner whatsoever. He said, it is well known, that when a Verdict is obtained against a Man for lying with another's Wife, such Piece of News is constantly put in the Papers, yet an Action for the Scandal was never attempted to be brought. But the Court said, that the present Advertisement has falsely represented the Fact; for Lofeild did not bring his Action for a Conspiracy, but for Bankcroft's maliciously charging him with Felony, and a Conspiracy requires an infamous Judgment. They said farther, that they well remembered, that this Advertisement was published just before the Trial; and it might be of dangerous Consequence to allow of such Practices, which might tend to influence Juries. Judge Lee said too, that the Court was of the same Opinion as to this last Point in the Case of The King and Chambers. Accordingly the Rule was made absolute. Vide post.

Palmey and Swan.

How far the Court will direct that an Attorney's Bill shall be taxed, notwithstanding he has obtained a Security for his Money.

AN Attorney having brought an Action upon two Bonds given by the Defendant November last, in Satisfaction of a Bill of Law Charges, Mr. Strange moved, that the Plaintiff might deliver in a Bill, that it might be refer'd to the Master to be taxed, and that in the mean Time all Proceedings might be staid. He said, that after an Attorney has had his Bill paid him, the Court will even grant, that the Bill may be taxed; and therefore there was much stronger Reason for granting the Motion in the present Case; which the Court accordingly did.

Anony.

Anonymus.

A Mandamus was moved for to be directed to Sir William Dudley, a Justice of Peace, to swear in two Persons Constables, who were chosen at the Leet, but were not present in order to be sworn there. 'Twas said, the Sessions could not appoint the Constables in this Case; because the Leet had. And the Constables could be sworn no where in this Case, but by particular Justices; to which Purpose was cited Salk. 175. Accordingly the Mandamus was granted.

How far a Mandamus will lie to Justices of Peace to compel them to swear in a Constable who was chosen at the Leet.

Winter and Morchand.

MR. Harper came now to shew Cause, and said, he could not oppose the Memorandum being made up of the 9th of February, which was the Day the Bill was sued out on; but in the Rule drawn up the Memorandum was ordered to be of the 12th, which was the Day the Bill was returned on; and that, he submitted it, was not right. For it might happen, that the Tender was made between the 9th and the 12th, yet certainly the Defendant ought to have no Benefit from it. But the Court said, the Bill, that must be filed to warrant the Alteration of the Memorandum, cannot be filed but of the 12th, for till then the Defendant was not in Court. For which Reason the Memorandum cannot be made but of the 12th. And if upon this the Defendant should plead his Tender ante exhibition Bill, and the Fact should be, that the Tender was between the 9th and the 12th, the Plaintiff may reply this, and help himself that Way. Accordingly the Rule was made absolute.

Vide ante 125.

Williams and Willis.

Serjeant Chappel moved to set aside a Verdict; because the Issue was tried by a Tales, whereas it could not be so by Law, in as much as there had been a Rule obtained for a special Jury. He said likewise, that several of those, that did appear of the special Jury, were not summoned at all by the Sheriff, as they ought to have been by the Statute of West. 2. 30. neither were their Names in the Body of the Distringas, as they ought to have been by the Statute of York, but were annexed by Way of a Panel to the Distringas. And to support this Fact he appealed to the Notes of Judge Lee, who tried the Cause, and observed, that the Defendant made no Defence. Judge Lee said, that he believed the Fact was, as the Serjeant had represented it; but, because these were only some Objections taken by the Counsel, when the Jury were swearing, he did not greatly attend to them. The Court said, that these Facts were proper to be made out by Affidavit; for which Reason they directed the Counsel to move this Matter again, and within a few Days, Affidavits of this sort were produced, and then the Court made a Rule to shew Cause.

How far the Court will set aside a Verdict, when there is no Defence at the Trial by Reason of Defects relating to a Jury.

Chapman and Wish.

How far the Court will give Leave that a Writ of Error may be amended.

Vide Vol. 1. 421.

A Plaintiff in Replevin had been removed up into the Common Pleas by Recordare, and the University of Cambridge came there and demanded Conusance; the Court of Common Pleas over-ruled the Claim of Conusance, and gave Judgment in the Replevin. A Writ of Error upon this was brought in this Court; but in the Writ of Error the Judgment was only set out to be ad grave Damnum of the Party in the Action, and not of the University. Upon which Mr. Reeves now moved, that the Writ of Error might be amended by adding the Words and also to the Damage of the Chancellor, Masters and Scholars of the University of Cambridge; and cited the Case of The Sword-Blade Company and Edwards, Hill. 1730. where the like Motion was granted. Accordingly the Court made a Rule to shew Cause. Vide post.

Chapman and others the Assignees of Woodward against Prestland.

How far the Court will enlarge the Time for the Defendant's pleading till the Plaintiff shall deliver back a Book to the Defendant which the Plaintiff has got in his Custody.

ON Rule to shew Cause, why the Defendant should not have four Days Time to plead after the Plaintiffs have delivered back a Book of Accounts, which they detained from the Defendant, Mr. Filmer said, that this was a Cash-Book, in which were entered all the Dealings between Woodward and the Defendant, writ with the Hand of the Defendant, and therefore proper to be made use of against him upon Evidence. He did agree, that there was a general Book of Accounts kept by Woodward, which is always copied from these several Cash-Books; but no Part of that Book is signed by the Defendant, and therefore it could not be made Use of against him upon the Trial. But Mr. Strange on the other Side said, that since the Plaintiffs have had this Book, they have made several Entries in it in their own Hands out of the General Account Book; and therefore it would be very extraordinary, that they should have it in their Power to give this Book in Evidence. He said farther, that they have actually taken a direct Copy of this Book since they have had it in their Possession; and therefore that will be sufficient Evidence. He took Notice likewise; that this Book was only lent them at first, and now they refuse to return it. He said too, that he well remembered a Case where one of the Parties took away the Papers belonging to the other by Violence from him, and the Court put off the Trial, which was to have been at the Bar, upon that Occasion. Accordingly the Rule was made absolute.

Cock and Wilkins.

MR. Harvey moved, that the Trial in this Case might be put off till the Plaintiff should pay the Costs of a former Notice. The Court agreed, that they grant these Motions in Ejectment, but said they do it in no other Action, upon which the Motion was refused. Mr. Harvey then said, that it would be but a fruitless Thing to pray an Attachment against the Plaintiff, because he absconded, so that he could not be served with it. Upon which the Court said, that you may have a Rule, that Service at his last Place of Abode may be a good Service; and accordingly that Rule was granted.

How far the Court will put off a Trial, or not, till the Plaintiff has paid the Costs of a former Notice.

Petty and Hulley.

MR. Parker moved to quash a Scire Facias to assign Errors, because it was returnable at a general Return Day, whereas the rest of the Proceedings were at a Day certain; and said, that the like Motion was granted in the Case of Heaton and Wills. Accordingly a Rule was made to shew cause. Vide Post.

How far the Court will quash a Scire Facias to assign Errors.

Philips and Grindel.

ONE of the Bail was served with a Scire Facias, returnable the first Day of this Term, on the 22d of April, the other on the 24th; the Bail were not able to take the Principal till the 26th, which was the 1st Day of the Term, and then too it was so late, that they could not surrender him in Court; but did surrender him that Day before Judge Probyn at his Chambers. Upon which Motion was now made, that Proceedings upon the Scire Facias might be staid; accordingly the Court made a Rule to shew Cause. Vide Post.

What shall be said to be a good Surrender of the Principal.

Wish and Chapman.

MR. Strange came now to shew Cause, and said, that the Statute of 5 G. only warrants Amendments of Writs of Error in those Respects, wherein the Writs of Error vary from the Record; and in the Case before cited of the Amendment, there was such Variance. He said farther, that in the present Case it does not at all appear, that the University ever intended to bring a Writ of Error, or gave the least Instructions about it. If they did not give such Instructions, it would be very extraordinary, that the University should be allowed to come now and pray that the Writ of Error might be amended, and they made Parties to it, when the Defendant below was solely at the Expence of obtaining it. For which Reason he submitted it, that there ought to be an Affidavit of that Fact, that the University gave Instructions to the Curator to make out the Writ of

Vide ante 130.

of Error, as well as the Defendant. He took Notice likewise, that the Judgment for disallowing the Conusance, and the Judgment at last given were intirely distinct the one from the other; and therefore distinct Writs of Error ought to have been brought upon them. But Mr. Reeves on the other Side said, that the Statute of 5 Geo. provides, that Writs of Error shall be amended for Variances or other Defect whatsoever. He said likewise, that if the Court should be of Opinion, that such an Affidavit as has been mentioned, was requisite, he believed, that could be easily got; for the principal Intention in bringing this Writ of Error was to determine, whether the Court of Common Pleas have given a right Judgment in disallowing the Conusance. And as to what was said about bringing two Writs of Error, he submitted it, that the bringing this one upon the principal Judgment was sufficient; for the whole Record will be before the Court by this Writ of Error, and in this Writ of Error the Court will take into Consideration, whether the Conusance was rightly disallowed, or not; for if it was not, the whole Judgment must be reversed, for the Court's below not having had a proper Jurisdiction. The Chief Justice said, that he thought it might be proper to have an Affidavit of the Fact, that the University did give Instructions for bringing the Writ of Error. He said likewise, that he did not see but a Writ of Error might have been brought instantly, upon disallowing the Conusance; and if such Writ of Error had been brought, he knew no Reason why this Court could not have proceeded, and have given final Judgment upon the Merits of the Action. The Court however agreed, that this Matter deserved farther Consideration; and therefore enlarged the Rule. Vide Post.

The King and The Justices of Willingford.

How far the Court will not quash a Mandamus, by Reason that the Return Day is expired.

How far the Court will supersede a Writ, notwithstanding the Return Day is expired.

MR. Taylor moved to quash a Writ of Mandamus, founded upon 3 & 4 W. & M. 12, (13) requiring Justices at a special Sessions to sign a Rate for reimbursing Surveyors of the Highways, for its not being certain enough. The Court said, the Time for returning the Writ was out; and therefore they would not quash it upon Motion; if there be any Faults in it, the Party will have the Benefit of it upon the Return. They did agree indeed, that they supersede Writs after the Time for returning them is out, and that without requiring a Return; because that is done quia erronee emanavit. But Mr. Fazakerly said, that the Court does even quash these Writs after the Time for returning them is out, before the Return is filed. The Court said, that was only for gross Faults. And Judge Lee declared, that in the Case of one of the Insurance Companies, he well remembered, the Court refused quashing one of these Writs, without a Return, after the Time for returning it was out. Accordingly the Motion was refused.

The King *and* Smith.

THE Defendant having been brought up by Habeas Corpus from Oxford Gaol, and Notice having been given to the Judge of the Court of Oxford, who committed him, that he would move to be discharged, M^r. Strange took several Exceptions to the Return. In the first Place, he said, the Commitment was for the Defendant's not giving 1000 Pounds Bail to the answerer a Complaint in *Causa Injuriae*. Now he observed, that the Commitment ought to have set forth, that there was an Affidavit made of the Cause of Action's being 1000 Pounds, in order to the justifying the Court below, in holding the Defendant to Bail in so great a Sum; for he submitted it, if that Court had any Right to hold Bail at all; the Statute that has been made for ascertaining the Bail, must extend to that Jurisdiction as well as to others. But he insisted upon it farther, that that Court had no Right to hold to Bail at all. The Civil Law is the Law which that Court proceeds by, and by that Law there is no Right of holding to Bail whatsoever. He said likewise, that he apprehended the Words in *Causa Injuriae* were Words intirely of an uncertain Signification. They will extend to an Ejectment as well as to other Actions; and in an Ejectment that Court has no Jurisdiction. These Objections, he observed, might be made to the very Foundation of the Commitment. But then he submitted it in the next Place, that the Commitment is wrong in Point of Form; for by the Commitment the Bedel of the University is only ordered to take him and carry him to Gaol. No Direction is hereby given to the Gaoler to receive him; nor does it appear what Gaol he was to be carried to. Accordingly the Court discharged him.

When a Commitment is returned upon a Habeas Corpus, how far the Court will discharge the Prisoner.

Leonards *and* Warren.

IN Debt on Bond, the Defendant pleads a Release of all Demands; the Plaintiff replies by Protestation denying the Deed, and farther sets forth quod non Relaxavit the said Demand by the Release set forth; et hoc petit quod inquiratur per Patriam. To this the Defendant demurs, and shews for Cause, that the Plaintiff has neither confessed nor denied the Deed of Release. To support the Replication, M^r. Hoskins cited Yel. 24. Cro. El. 889. Salk. 138. But the Court inclined to be against him; however, ordered this Matter to stand over. And the next Day he moved to discontinue upon Payment of Costs.

What shall be said to be a good Pleading, or not, relating to a Release.

Midger and Tirrel.

How far the Court will give Liberty that a new Count may be laid in the Declaration.

IN an Indebitatus Assumpsit, the Plaintiff had delivered his Declaration before the Eterm-Day, but all was in Paper; and upon this Mr. Kettelby moved for Liberty to add a new Count. Mr. Monday said, that the Rule of the Court was, that the Plaintiff shall not add a new Count after the second Term is over; but before the second Term is over he may. Accordingly the Court made a Rule to shew Cause; and afterwards made it absolute.

Anonymus.

Vide ante 75.

THIS Matter coming now on again, Mr. Fazakerly said, that he apprehended clearly, that the two Overseers appointed by the Justices at the Sessions, had no Authority to inquire into any Erection of a Turnpike made in Kingston Town; for the erecting it within the Town, is the same Thing as if it was erected five Miles beyond the Town, a Matter intirely out of the Power of the Trustees, for which they are punishable by way of Indisament, as for a Nuisance. For which Reason he submitted it, that this Act done by the Trustees, could not be considered as an Abuse of their Authority, of which the two Overseers could take Conusance; and consequently, all that the Sessions have done in Pursuance of it, must be void likewise. Accordingly the Court was of the same Opinion; so the Rule was made absolute for quashing the Orders. But at the same Time the Court declared, that the other Objection, which was before made, in relation to the Justices making an Order upon the Sheriff to abate this Turnpike, they thought would avail very little; and the Case of *The Queen and Wyat*, Salk. 380. which Mr. Reeves said was determined Trin. 4 Ann. was cited by him as a Case very strong for that Purpose.

Hornbey and Carleton.

Vide ante.

MR. Abney moved now, that the Rule for shewing Cause, why the Order of Sessions should be quashed, might be discharged; and said, that he believed it was so clear a Case, that the Settlement of Martha D'Anvers was not at Hornbey, that the Counsel of the other Side would not oppose it. Mr. Yates said, that the Attorney of the other Side had not been with him lately. Accordingly the Court discharged the Rule Nisi.

— and Morrice.

Serjeant Chapel moved that the Plaintiff's Imparlanee might be struck out of his Replication, and that the Defendant might have a Week's Time for delivering back the Paper-Book. He said the Defendant had pleaded a special Plene Administravit, and that neither at the Time of exhibiting of the Bill, nor since, he had Assets beyond 1000 Pounds, which are liable to satisfy the Demands set forth in the Plea. This Plea was put in last Term; the Plaintiff imparls to this, and then in his Replication sets forth, that the Defendant had Assets, either at the Time of exhibiting the Bill, or since, beyond 1000 Pounds; and so concludes to the Country. Upon this the Serjeant observed, that if the Plaintiff's Imparlanee stood, the Words of the Issue would relate to this Term, whereas they ought only to relate to the Time which the Defendant has pleaded them on. He said farther, that the Plea contained three hundred Sheets of Paper; and therefore would be very necessary that there should be a longer Time for returning the Paper-Book, than is allowed by the Rules of the Court in ordinary Cases. The Court said, that the Imparlanee must be struck out; and the Defendant may well justify returning back the Paper-Book, as not accepting it, on Account of the Paper-Book's being made up wrong; and then, by the Rules of the Court, the Defendant will have four Days for returning the Paper-Book, after it is delivered him again. They said farther, that by this Issue the Defendant will not be confined to the exact Sum mentioned in the Plea; and though more should be proved to be in his Hands, yet if they do not amount to more than the Demands set forth in the Plea, the Defendant must have a Verdict. And so they said it was held in the Case of Parker and Hatfield, Salk. 311. Accordingly the Defendant returned the Paper-Book to the Plaintiff in open Court.

How far the Court will give Liberty or not, that an Imparlanee shall be struck out.

The King and The Inhabitants of Uxeter.

Serjeant Birch came to shew Cause, why an Order of Sessions, discharging a Rate made upon the Parish of Uxeter at large, should not be confirmed; the Justices at the Sessions being of Opinion, that the Townships of Craiton, Drakemast and Strongton, being Villis within the Parish of Uxeter, ought to relieve their Poor separately, at large by themselves. The Exceptions taken to the Order were, that these Townships were not within the Statute of 13 & 14 Ch. 2. 12, 21. and for this Purpose was cited 2 Lev. 142. 3 Keb. 422, 539. It was said farther, that admitting they were within it, yet still it ought to have been adjudged in the Order, that the Parish of Uxeter was so large, as that the Poor could not have the Benefit of 43 Eliz. It was observed likewise, that the Appeal was wrong, it being from all the Townships jointly, whereas there should have been a distinct Appeal from each of the Townships. And likewise it was insisted upon,

Vide ante 125.

upon, that in an Appeal from a Rate the Sessions can only consider the Equality or Inequality of it; and cannot try the Bounds of a Township in it. The Counsel of the other Side said, that the Case of Stokelyn and Dalton, Hil. 10 Ann. was a Case very strong in Favour of them. However, took a Day to shew Cause. Vide Post.

When a Judgment in the Common Pleas is affirmed in the King's Bench, what shall not be said to be a good Writ of Execution on such Judgment.

Champion and Osbaldiston.

ON Rule to shew Cause, why a Capias ad satisfaciendum should not be quashed; the Exception taken to it was, that it was sued out upon a Judgment of the Court of Common Pleas affirmed in this Court, and made returnable at a general Return, whereas the Proceedings in the Action below were all at a Day certain; accordingly the Rule was made absolute.

Petty and Hulley.

Vide ante

MR. Marsh came now to shew Cause, and said, that he did agree, that when Writs of Error have been brought upon Judgments in the Court of Common Pleas, and Process in those Writs of Error made returnable in a different way from the Process in the Court of Common Pleas, such Process has been set aside for that Reason. And that was the Case of Eadon and Wills, Pasch. 12 Geo. 1. before cited. But in the present Case, the Writ of Error was upon a Judgment in the Marshalsea, where the Proceeding was by Plaint, which is in the Nature of an Original; and therefore he submitted it, that it was right in the Court above, that the Process should be made returnable there in the same Manner as in Proceedings by Original. But Mr. Parker on the other Side said, that the Process in the Court of Marshalsea is always returnable at a Day certain; for which Cause, he apprehended, that this Case was within the Reason of that cited, that the Process here should be returnable so too. He said farther, that the Scire Facias was made returnable a die Paschæ in quinden' Dies, whereas it should have been quindecim. The Court said, that the Process, which was returnable in the Marshalsea in this Case, was made returnable at that, which is the common Return-Day in that Court; for they have no Difference between one Return and another; and therefore the Process here ought to be returnable at that, which is the common Return-Day in this Court. Then as to the other Exception, they said, quinden' was a good Abbreviation for quindenos; and they did not see why that was not very right likewise. Accordingly they discharged the Rule.

Billingsley and Taps.

THE Plaintiff arrested the Defendant by Virtue of a Capias How far an Appearance shall cure a Defect in Process.
 tested the last Day of last Term, returnable the first Day of this; and that four Days before the Teste of his Original, which was on the 6th of April. Upon which Mr. Strange moved, that the Plaintiff might be obliged to give Oyer of such an Original, as would warrant the Proceedings, or else that the Proceedings might be staid. Mr. Fazakerly on the other Side said, that Writs issuing out of this Court can only be tested in Term-Time, though issuing out of Chancery they may; for which Reason, though the Original in this Case bore Teste in the Vacation, yet there was a Necessity that the Capias should bear Teste in the Term before it. And he said, the Court has been of this Opinion before in the Case of Andrews and Dingley. The Court said, that regularly one Part of the Process ought always to bear Teste upon the Return of the other; and that was held so in the Case of Bradley and Banks, Yel. 204. But yet they thought, that an Appearance would cure such Defect, and had done so in the Case before them; for which Reason the Court refused to make any Rule. Vide Post.

Wish and Chapman.

MR. Reeves now produced such an Affidavit as was required, Vide ante 130.
 and therefore moved, that the Rule might now be made absolute for the Amendment. But Mr. Strange on the other Side argued, that still this Amendment was out of the Intent of the Act of Parliament. The Defect before the Act, he said, was, that Writs of Error were brought, that would not remove the Record up, and when a great deal of Time had been spent in examining the Proceedings of the Court below, then the Plaintiff in Error would discover, that his Writ of Error had not removed up the Record, and consequently that the Court above had no Authority to affirm the Judgment. He would then move, that his own Writ of Error might be quashed; and examine into all the Proceedings again, by bringing a new one. This was the Defect which the Parliament intended to remedy; and this was the Defect which must be understood by those Words in the Act, Variance or other Defect whatsoever. He then observed that the present Writ of Error was sufficient to remove up the Record; and the Distinction for this Purpose, he apprehended, was, between leaving out of the Writ of Error Part of what is in the original Record, and adding to the Writ of Error more than is in the original Record; the first Sort of Writs of Error, he submitted it, would remove up the Record; the second he agreed would not. The Court said, that they did allow the present Writ of Error had removed up the Record, and that the principal Mischief before the Act was, in the Cases where Writs of Error did not. But still they thought that ought not to hinder them from giving Relief in
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other Cases, where the Words are general enough for that Purpose. Accordingly the Rule was made absolute.

Anonymus.

How far the Court will grant an Information against a Person for asserting his Right in a violent and forcible Manner.

Serjeant Belsfield moved for an Information against one Delameer, Mayor of the Town of Helston, for assaulting a Farmer, throwing down his Corn, and hindering him selling in the Market, under Pretence that he would not pay his Toll. He said, that the Court would not allow of such a violent Proceeding in a publick Magistrate's asserting a Right. Accordingly a Rule was made to shew Cause. Vide post.

Anonymus.

How far the Court will grant an Information or not, for a Libel, when a Body of Men are reflected on by it.

MR. Fazakerly moved for an Information against one Osborn, for printing a Libel reflecting upon the Portuguese Jews, that lately came over, in charging them with being guilty of burning a Bastard Child begotten by a Christian on the Body of a Jewish Woman. He said too, that several Jews have been insulted by the Mob upon this Occasion. Lord Raymond said, that he believed the Court could do nothing in this Matter, by Reason that no particular Jews could be able to shew to the Court, that they were pointed at more than any others; and thought that Lord Chief Justice Holt was of this Opinion in the Case of Orm and Nut. However the Court made a Rule to shew Cause. Vide post.

The King and Beaumont.

How far the Court will grant an Information for a Riot.

ON Motion to make a Rule absolute for an Information for a Riot, Mr. Fazakerly said, that he had got Affidavit against Affidavit, and owned that then the Rule was to make the Rule absolute, that the Fact might be tried. But still he submitted it, that the Court would make it Part of the Rule, that no Proceedings should be upon the Information, till the Matter of Right, which was in Question, was tried in a feigned Action. The Chief Justice said, that he has known Lord Holt refuse to try an Indisment, where a Right was in Question; and Judge Page said, that he has known Lord Trevor refuse the same. Accordingly the Rule was made absolute; but such Clause was added to it, as has been mentioned.

Billingsley and Taps.

Vide ante 137.

THE Defendant had since the last Motion demanded Oyer of the Capias, and pleaded, that he was arrested upon it four Days before the suing out of the Original, but had not verified this Plea by Affidavit. Upon which Mr. Fazakerly moved that the Plea might be set aside, and that with Costs, as being against

gainst the Opinion of the Court. The Chief Justice said, that he thought, that the Defendant was well intitled to Oyer of the Capias, but that he could not have Oyer of the mean Process without having Oyer of the Original one, and that he had not demanded. Accordingly the Plea was set aside with Costs.

Eads and Mason.

MR. Taylor moved to make a Rule absolute for the Defendant's having Liberty to withdraw his Plea of the general Issue, and plead another Plea of a Tender. How far the Court will give Liberty that a Plea shall be withdrawn. Mr. Moreton said, that he was ready to shew Cause, and submitted it, that the Court had never gone so far, and that they would not go so far in this Case especially; because Issue was already joined, and Notice of Trial actually given. The Court however were of Opinion, that the Rule was proper; accordingly upon Payment of Costs and the Defendant's agreeing to accept short Notice of Trial made it absolute.

Ash and Mathews.

ON Rule to shew Cause, why Judgment in Ejectment should not be set aside, Mr. Monday informed the Court, that on the last Day of every Term he keeps a separate Paper, in which he enters down the Minuets of those Motions, that are made that Day for Judgment in Ejectment, and within a Day or two after he makes out that Paper in Form fit for Attornies to come and peruse; but the Motions of this Sort, that are made in the other Parts of the Term he takes down in this Common Paper-Book with the other Motions, and at his Leisure after the Term he generally makes out a particular Paper of them too. On the 3d of February last, Motion was made in this Cause for Judgment in Ejectment; within two Days after the Term the Defendant's Attorney came and searched in the Paper of Ejectments made out for the last Day of the Term, and finding no Motion made that Day in this Cause, he did not enter into the common Rule to confess Lease, Entry and Duffer; and upon that the Plaintiff signed his Judgment. Mr. Floyd upon this said, he did agree, that the Judgment was strictly regular; but yet as this was owing merely to a Mistake in the Defendant's Attorney, he submitted it that the Court would set it aside; especially as the Defendant has lost the Benefit of making a Defence at the Trial. Accordingly the Court made the Rule absolute upon Payment of Costs. How far the Court will set aside a Judgment in Ejectment on payment of Costs.

Throg-

Throgmorton and Smith.

When an Ejection is brought by an Infant, how far the Court will direct that the Infant should nominate a good Lessee in order to be answerable for the Costs of the Suit.

IN Ejection M^r. Strange moved, that the Lessor of the Plaintiff, being an Infant, might nominate a good Lessee for the Plaintiff, or else that Proceedings might be staid. The Reason for making this Motion, he said, was, that otherwise there would be no one, whom the Defendant could recover his Costs against. And the same Thing, he observed, was done in the Case of Noke and Windham, East. 12 Geo. 1. M^r. Abney on the other Side said, that he submitted it, this Motion was intirely needless; for that, as he apprehended, the Lessor of the Plaintiff would be obliged to pay Costs. He took Notice, that in 2 Leon. 217. it is held, that an Infant may make a Lease to try a Title. And in 3 Keb. 347. is the Opinion of Twicken, that this Rule will subject the Infant to pay the Costs. But Judge Lee said, that he well remembered the Case of Noke and Windham before cited, and he was of Counsel in it. The Defendant there moved for a Trial at Bar, and likewise that the Lessor of the Plaintiff might nominate a good Plaintiff; and on the Rule to shew Cause for that Purpose it was the declared Opinion of the Court, that such Motion ought to be granted; upon which M^r. Gapper, who was one of the Counsel for the Lessor of the Plaintiff, consented, that the Lessor's Father should be made Plaintiff. The Court was of the same Opinion in this Case; accordingly they made a Rule for this purpose Nisi on Saturday.

Hayes and Warren.

Vide ante 71.

THIS Matter coming now on again, M^r. Hussey argued for the Plaintiff in Error, and said, that the Promise laid in the Declaration only was, that Quod cum prædictus querens fecisset & performasset diversa Opera & Labor' pro eodem Carolo, ipse idem Carolus postea eodem Die & Anno promised to pay for them, as much as they were worth, without setting forth any Request, that there was for the doing this Work. He observed, that this was a past Consideration, and therefore according to the general Rule of Law no Promise could be founded upon it, unless there was such a Request. In some Books it has been carried so far as to be held, that, though there was a Request made by the Defendant that the Consideration should be performed; yet, when once that Consideration is past, that can be no Consideration sufficient to support a future Promise. For which Purpose he cited 3 Cro. 741. But he submitted it, that in all the Books it is held, that, wherever such past Consideration is allowed, at least there must be a Request laid for the Performance of it. And so is it held in 1 Roll's Abr. 11. Pla. 1. Cro. Eliz. 442. 3 Leo. 91. and of this Opinion Judge Powel declared himself to be in the Case of Cowel and Sir Thomas Coke, Pasch. 11 Ann. M^r. Strange on the other Side argued, and said, that he did agree, that wherever the Consideration past concerned the Be-

nest of a Stranger only, a Request is necessary to charge the Defendant. But wherever the Consideration is for the Benefit of the Defendant, he submitted it, that no such a Request was necessary, when there is an express Promise laid in the Declaration. For this Purpose, he said, it is held in 2 Leo. 111. that if A. promises B. to pay him 20 l. in Consideration that he has married A's Daughter, that is good. The same Case is allowed in Hutton 84. It is likewise held there, that if a Man promises another to indemnify him for having been Bail for him, that is sufficient; so if he promises to give him a Horse for such past Service; and likewise it is held there, that if a Man promises a Carpenter, that in Consideration of his having well built his House, he will pay him 5 l. that is good. And the principal Case there is of a Man's promising his Servant to pay him such a Sum in Consideration of his faithful Service which he has performed him; that was held a sufficient Consideration; and Judgment given for the Plaintiff. He likewise relied upon Raymond 260, and submitted it, that the Case cited by the other Side out of 3 Cro. 741. could not be Law. He observed farther, that as this Declaration was laid, the Consideration did not appear to be past at the Time of the Promise; for the Promise is laid to be on the same Day with the Consideration; and the Law will admit of no Fractions in a Day; for which Purpose he cited Latch 150. and 1 Roll's Rep. 414. And submitted it in the last Place, that there was a Request sufficiently laid; for the Work is laid to be done for the Defendant, and if the Defendant had not ordered it to be done, it could no more be said to have been done for him than for a Stranger; it is laid likewise, that proinde the Plaintiff deserved of the Defendant so much, and that the not paying this by the Defendant was to the Plaintiff's Damage, which could not be, if the Work had not been done at the Defendant's Request and Approbation. But he thought, there could be no Doubt, but this Declaration must be sufficient, since there is Judgment by Nil dicit, and the Statute for the Amendment of the Law has extended the Statute of Jeofails to those Judgments as well as others. The Court declared, that they took the Rule of Law to be, that no past Consideration is sufficient to support a subsequent Promise, unless there was either a Request of the Party express or implied at the Time of performing the Consideration. Some Ads, they said, were of such a Nature as that the Law would imply a Request, as the being Bail for one, curing one's Child of a sudden Sickness, performing the Part of a Servant, &c. and therefore in those Cases they did allow, that a subsequent Promise might be well founded upon such past Consideration. They did agree likewise, that where there was an express Request at the Time of the past Consideration's being performed, that might in all Cases be sufficient to support a subsequent Promise. And therefore the Chief Justice said, he could not agree the Case cited out of 3 Cro. 741. to be Law. But in the present Case the Ad done by the Defendant was by no Means of such a Nature as to be sufficient for the Law to create a Request upon it; and therefore an express Request was necessary to have been

laid. They said then, that they thought there was by no Means an express Request laid in this Case; and however this Declaration might be sufficient after a Verdict by the Common Law, they were of Opinion, that this was by no Means so strong a Case upon a Judgment by Nil dicit. For this Purpose Judge Lee said, that he well remembered the Case of Colliers and Lowther, Pasch. 1713. where the Distinction taken by the Court upon this Statute for the Amendment of the Law was, that all such Defects were cured upon Judgments by Nil dicit, as were cured by the former Statute of Jeofails upon Judgments after a Verdict, but not such Defects as were helped by Verdicts at Common Law. They said likewise, that they thought this Consideration must be a past one, as laid in the Declaration, by Reason of the Word Postea. Accordingly reversed the Judgment unless Cause.

Goodtitle and Pettoe.

Vide ante 90.

THE Chief Justice delivered now the Resolution of the Court, and said, that they were unanimously agreed, that the Defendant had no Title, upon Account of there being no Consideration arising from her, which the Covenantor could have any Benefit from; though they did agree, that if the Covenant had been to the Use of the Wife in Fee, and then she had appointed the Defendant to have taken Benefit of the Use, that would have been good. He said, that they were agreed likewise, that the Plaintiff had a good Title, upon Account of the Person being ascertained in the Deed, whom he claimed under, and consequently an Averment of a Consideration may be well allowed, which he may take Benefit from; and its being stated by the Case, that the Fact was, that he was Nephew to the Covenantor, they thought, that was a sufficient Averment of a Consideration. He observed, that their Resolution was founded upon Bredon's Case, and Mildmay's Case in 1 Rep. and in Harpur's Case in 11 Rep. Accordingly Judgment was given for the Plaintiff.

Hall and Godley.

How far the Ecclesiastical Court shall not have Jurisdiction in a Suit for a Rate for the Repairs of the Church.

ON Rule to shew Cause, why a Prohibition should not be granted to the Ecclesiastical Court, Mr. Fazakeyly said, that the Suggestion sets forth, that the Plaintiff below has libel'd upon a Rate, by which the Inhabitants of the Parish of St. Clement's in Hastings, that lived there in the Year 1729, are required to pay a certain Pound Rate towards the Building of a Church, that was finished in the Year 1736. The Suggestion farther set forth, that a Suit was instituted in the Court of Exchequer, by the Workmen, against some of the Inhabitants, wherein there was a Decree against those Inhabitants, and the Rate farther ordered, that the rest of the Inhabitants should be contributory towards the Expence of that Suit; and upon that Part of the Rate the Libel was founded likewise. Upon each of these Parts of the Libel, Mr. Faxakerly submitted it, that the Ecclesiastical Court had a Jurisdiction. But

the Court was of Opinion, that they had not; accordingly the Rule was made absolute.

Buckle and Brown.

IN a Replevin of a Distress taken by the Officers of the Tower, for Trophy Money, supposed to be due upon the Statute of Ch. 2. Mr. Robinson moved, that the Defendant might have Liberty to plead two Pleas; one, De injuria sua propria; the other, that the Defendant is a City Attorney, and thereby discharged from all Offices of bearing Arms, and all Duties of this Sort. He said, that in the Case of one Smith, which the Chief Justice was of Counsel in, it was determined, that they were discharged; but still this Point is endeavoured to be called in Question again; accordingly the Motion was granted.

How far an Attorney shall be discharged from the Payment of Trophy Money.

The King and Pexley.

MR. Kettleby moved to quash an Indictment, tried before the Justices at Hicks's Hall, against the Defendant for taking above 5 Pounds per Cent. and submitted it, that upon none of the later Statutes which have made it illegal at different Times, to take above 8 Pounds per Cent. 6 Pounds per Cent. and 5 Pounds per Cent. the Justices at the Sessions have Jurisdiction; tho' he did agree, that upon the Statute of Eliz. which makes it illegal to take above 10 Pounds per Cent. they have; and for this Purpose he relied upon 2 Salk. 680. Accordingly, the Chief Justice absent, a Rule was made to shew Cause.

How far the Sessions have no Jurisdiction to hold Plea in an Indictment on the Statutes relating to Usury.

Mitchel and King.

IN an Action in this Court, the Defendant pleaded, that the Plaintiff had impleaded him for the same Cause of Action in the Court of Common Pleas, which Action in the Court of Common Pleas was commenced before the Suit began in this Court, and was still subsisting at the Time of the Plea. Upon this the Plaintiff replied Nul tiel Record; and a Day being now given to verify his Plea; he produced an Entry of the Writ of Quare clausum fregit upon Record, with an Affidavit, that the Plaintiff sued out this Writ, in order to declare against him for the same Cause of Action as this was sued against him; which Mr. Agar submitted it, was sufficient. But Judge Page, the Chief Justice absent, declared, that the Plaintiff could not be said to have impleaded the Defendant, till he declared against him; accordingly was of Opinion, that the Defendant had failed of his Record; and thereupon was awarding a Respondeas Ouster. But Mr. Bootle Junior submitted it, that as Issue was joined upon Nul tiel Record, and the Defendant had failed upon the Trial, the Plaintiff was intitled to final Judgment. Judge Page said, that he was not of that Opinion, though he agreed this would have been so, if the Issue had been tried by the Country. Now

When the Defendant pleads in Abatement that the Plaintiff has commenced another Action against him, which is yet depending for the same Cause, with the present one, and the Plaintiff joins Issue upon it; how far the Defendant shall be said to fail in his Plea. How far a Person shall not be said to have commenced his Action till he has declared.

ever, gave the Plaintiff Liberty to sign what Judgment he thought proper, at his Peril.

The King and Bowden.

When a Conviction is made upon the Statute of 7 & 8 W. relating to Tithes; how far such Conviction shall be said to be good, or not.

MR. Pilsworth moved to quash an Order of Justices made upon the Statute of 7 & 8 W. 6. for its not being set out in the Order, that there had been a Demand made of the Tithes before the Application to the Justices. He said likewise, that the Party ought to have staid twenty Days after the Demand, before he applied to the Justices; and this ought to have appeared in the Order likewise. Accordingly, the Chief Justice absent, the Court made a Rule to shew Cause. Vide Post.

Perington and —.

How far Judgment in Ejectment must be moved for the same Term, that the Declaration is served in.

MR. Abney moved for Judgment in Ejectment upon an Affidavit of Service of the Copy of the Declaration in Hill Term last; the Reason, why this Motion was not made before, he said, was, that the Defendant till now insisted upon his Privilege. But Mr. Strange objected, that the Court never allows of these Motions but in the very Term which the Declaration is served in; and he said it might be reasonable to make the Tenant search one Term to see, whether he is obliged to enter into the Rule to make himself Defendant, but it would be unreasonable to make him search longer. The Court too was of the same Opinion; accordingly disallowed the Motion.

Salter and Williams.

How far the Court of King's Bench can make a Rule upon a Judge of an inferior

ON a Rule to shew Cause, why the Judge of a Hundred Court should not be obliged to give Judgment; the Chief Justice said, that he never knew a Rule made upon such an Occasion; but a Mandamus was the proper Remedy; accordingly it was discharged.

Court, to give Judgment in a Cause which is depending before him.

The King and Paterfon.

When a Motion is made that the Defendant may submit to a small Fine, what Kind of Affidavits are proper to be read on such Occasion.

THE Defendant having been indicted for an Assault, and confessed the Indictment, Mr. Fazakerly moved that he might submit to a small Fine. Upon which Mr. Strange produced Affidavits, that this Assault was upon an Officer in the Execution of his Office. But Mr. Fazakerly submitted it, that these Affidavits proved the Fact to be of a different Nature from that charged in the Indictment, and the Defendant had confessed no more than that which was charged in it; for which Reason they ought not to be read against him. However, the Court was of Opinion, that they well might; and they were read accordingly.

Howel and Walker.

ON Rule to shew Cause, why an Attachment should not go against the Defendant for Breach of an Award; M^r. Marsh objected, that the Rule was obtained upon the Affirmation of a Quaker, which ought not to have been admitted; because the End of the Attachment is to punish the Defendant in a criminal Manner, for a Contempt of the Court; and to shew that such Affirmations have been actually refused in these Cases, he cited that of The King and Wych. But the Master said, that these Attachments issue out of the civil Side, and the End of them is only to recover a Duty of a civil Nature, and in the Case of one Jasper it was allowed. The Court too were of the same Opinion; but enlarged the Rule, that Precedents might be searched.

When a Motion is made for an Attachment, how far the Affirmation of a Quaker may be read, or not, in Support of such Motion.

The Bishop of London and The Mercers Company.

THE Judgment of the Court of Common Pleas having been affirmed by this Court; Serjeant Belfield moved, that the Defendant in Error might have Damages given him in Pursuance of the Statute of 3 H. 7. 10. and that to the Value of the Living. And for this Purpose cited 1 Cr. 145, 173, and Dy. 77. Accordingly a Rule was made to shew Cause. Vide Post.

Vide ante 108.

Anonymus.

Several Persons having been ordered by the Court to attend, and the Court having now thought it proper that the Matter should be inquired into more strictly before the Master; M^r. Kettleby moved, that they might be committed in the mean Time. But M^r. Strange said, that upon these References to the Master for a more strict Inquiry, the Court always allows the Party to go at large upon his own Recognizance; though he did agree, that after the Party is taken upon the Attachment the Recognizance of other Persons is requisite, as well as his own. Accordingly each Party was allowed to go at large, in the present Case, upon his own Recognizance.

How far a Person shall be discharged upon his own Recognizance.

More and Eyles.

IN Debt brought against an Heir upon the Bond of his Ancestor, the Defendant pleaded his Infancy, and prayed, that the Plea might demur; but no Affidavit was made to verify the Plea at the Time of its being put in. Upon which M^r. Timothy Barnardiston moved, that the Plea might be set aside for this Reason. But the Court was of Opinion that the Plea was a temporary Plea in Bar, and not a Plea in Abatement; accordingly refused the Motion, the Chief Justice and Judge Lee absent.

What shall be said to be a Plea in Bar, and not in Abatement.

Maynard and Harvey.

How far the
Court will
require a
Person to
give Oyer of
a Writ.

IN a Scire facias against Bail the Defendants pleaded, that a Capias ad Satisfaciendum was sued out against the Principal, and that he was taken in Execution on it. The Plaintiff's Counsel now said, that if there was any such Writ, it must be a Record of this Court, and therefore they moved, that the Defendants might be obliged to give Oyer of this Writ, and if they did not, that Judgment might be entered against them; and for this Purpose cited a like Case of Hunter and Wiseman. Accordingly the Court made a Rule to shew Cause, the Chief Justice and Judge Lee absent. Vide post.

Lomax and Holden.

Vide ante.

ON Rule to shew Cause, why the Issue in this Cause should not be tried at the Bar, Mr. Strange said, he should not oppose it, but submitted it, that it must be upon Terms that the Defendant will pay Bar-Costs, and receive Nisi prius ones; because he had an Affidavit, that the Plaintiff was not worth 5 l. in all the World, besides the Estate in Question. Mr. Reeves on the other Side observed, that this was an Issue out of Chancery, which that Court had directed to be tried at the Bar, and therefore this Court would put no Terms upon the Parties. Accordingly the Rule was made absolute without imposing any Terms upon the Parties at all; the Chief Justice and Judge Lee absent.

Cole and Cockerel.

How far a
Demand shall
be said to
be necessary,
or not.

IN a Quantum meruit for Lodging and Diet for the Defendant's Wife, which the Plaintiff declares, that he delivered to the Defendant's Wife at the special Instance and Request of the Defendant; the Defendant pleads, that at the Time supposed by the Declaration his Wife eloped from him; absque hoc, that the Goods were delivered to his Wife at his Request modo & forma. Upon this Issue was joined; and upon the Trial no special Request could be proved; accordingly a Case was made for the Opinion of the Court upon this Point, whether a Request was necessary. Mr. Acherly argued, that it was necessary; and submitted it upon this single Point, that in the present Case a special Issue was joined, which must be proved specially as it is laid; and for this Purpose cited 7 H. 4. 11. and 2 Saund. 317. But the Court was of Opinion, that the Request in this Case was implied by the Law upon the Delivery; and that the Rule, that has been mentioned, does not extend to such Things, as the Law implies; but to those Things only, which the Law does not imply; accordingly, Judge Lee absent, they gave Judgment for the Plaintiff.

The King *and* Lady Lawley.

THE Defendant having been examined upon Interrogatories for a Libel published by her on the Proceedings of the Court, and the Master now reporting her in Contempt, M^r. Marsh submitted it, that it appeared upon her Examination, that what she did was by the Instance and Direction of her husband, and therefore the Punishment ought not to be inflicted upon her, but upon her husband. But, if the Court should be of Opinion, that she was answerable for this Offence, at least the Court would bail her, till they could be prepared to pass the Judgment. The Chief Justice said, that the Excuse that has been mentioned could be none in these Offences, though it is in Felonies. And as to bailing her, the Court declared, that a Report of the Master was in the Nature of a Conviction, and therefore they could not do it. Accordingly the Motion was disallowed, Judge Lee absent.

How far a Master's Report shall be laid to amount to a Conviction.

The King *and* Britton.

THE Defendant having been indicted upon the Statute of 5 Eliz. for exercising the Trade of a Cutler, without having served a legal Apprenticeship. M^r. Draper took an Exception to it, which, he said, had often been allowed, that the Trade was laid in the Indictment to be used *infra hoc Regnum Angliæ* at the Time of the Act; whereas there was now no such Kingdom. For this Purpose he cited the Case of The King and Windgrove, Hill. 3 Geo. 2. which was determined upon the Case of The King and Paris, which had been before determined upon the Case of The King and Hog, Trin. 9 Geo. 1. The Case of The King and Windgrove, he said, was an Indictment for exercising the Trade of a Baker. The Case of The King and Thompson, he observed too, was to the same Purpose, and that was an Indictment for exercising the Trade of an Ironmonger. And so that of The Queen and Robinson, Easter 1714. for exercising the Trade of a Barber. Serjeant Chappel on the other Side argued, and said, he did agree, that Indictments have been quashed upon this Exception, where the Trade, which the Party is indicted for exercising, is not one of those, which is by Name mentioned in the Statute; but the Trade which the present Defendant is indicted for exercising is one of those; for which Reason he submitted it, that it was unnecessary to have averred, that the Trade was used in England at the Time of the Act; because the Act itself has expressly declared it to be so; and therefore he apprehended, that the Clause of *infra hoc Regnum* shall be rejected as Surplusage. To which Purpose he cited the Case of White and England, 3 Salk. Accordingly the Court ordered this Matter to stand over, Judge Lee absent. Vide post.

When a Person is indicted for exercising a Trade without having served a legal Apprenticeship contrary to the Statute of 5 Eliz. how far such Indictment shall be said to be good, or not, in respect of its describing the Trade to be exercised within this Kingdom at the Time of the Act.

The

The Parish of Northfetherton *against* The Parish of Hor-
sington.

How far an
Order of Re-
moval shall
be said to be
conclusive to
all the
World.

ON Rule to shew Cause, why an Order made by two Justices for the Removal of one John Powen, Mary his Wife and three Children to the Parish of Northfetherton, which was affirmed at the Sessions, should not be quashed; and why an Order of Sessions, discharging an Order of two Justices made afterwards for the removing the said Mary by the Name of Mary Hellior, and four Children, as being Bastard Children, to the Parish of Horsington, where they were born, should not be likewise quashed; and the said last Order of two Justices confirmed; M^r. Fortescue said, that he apprehended, the Law was very clear, that wherever an Order of two Justices is made for a Removal, and that Order not appealed from at the next Quarter Sessions, or affirmed upon the Appeal, that Removal is conclusive to all the World. Now he observed, that there was such an Order in the present Case for a Removal to the Parish of Northfetherton, which was actually affirmed at the Sessions; and therefore he submitted it, that the subsequent Order of two Justices was clearly irregular. M^r. Reeves on the other Side argued, and said, he should not contend, but the Rule of Law was as has been mentioned; neither should he contend, but the Fact really was, that the same Woman with three of the same Children was sent to the last Parish of Horsington. But he said, upon stating the Whole of the Case it would appear, that the Parish of Horsington was the Parish, which ought to be charged with these Persons; and therefore, if the Merits could in any Way be come at, the Court would certainly allow it. The Whole of the Case, he observed, was, that this Mary Hellior was indeed married to this John Powen; but he was at that very Time married to another Woman; and consequently the Marriage with Mary Hellior was a mere Nullity; the Children were Bastards; and therefore Mary Hellior and her Children in Conscience ought to be maintained by the Parish of Horsington, which was the Place where her Settlement was, and the Place where the Children were born. Now the Way, in which this Order of Removal to Horsington might be made good, he apprehended, was, by considering, that the Person removed by the Name of Mary Powen, and the Person removed by the Name of Mary Hellior, could not upon these Orders be taken to be the same Person. The Court doubted, whether this last Order could be maintained in the Manner that has been mentioned; but if it could in any Way, they said, it certainly should. Upon this Judge Probyn took two Exceptions to the Order of Removal to Northfetherton; first, that the Order was only said to be made upon due Examination and other Circumstances; secondly, that the Ages of the Children were not mentioned in it. Accordingly, Judge Lee absent, this Matter was ordered to stand over. Vide post.

Maynard *and* Harvey.

THIS Matter coming now on again upon Motion to make the Rule absolute, the Chief Justice said, that he did not think, that this Case came up to the Case of Hunter and Wiseman; for that was of a Judgment pleaded of this Court; and there indeed the Party pleading the Judgment is obliged to give a Note of the Roll which the Judgment is of, otherwise the Search might be endless. But Writs are always upon the File, and the Search therefore by no Means so difficult. For which Reason, Judge Lee absent, the Rule was discharged. And the Chief Justice said, as this Case was, he did not think that the Party was intitled to Oyer; but his Remedy is by pleading Nul tiel Record.

Vide ante 105.

Wildish *and* Lunden.

A Judgment in Ejectment having been referred to the Master for Irregularity, he reported the Fact to be, that the Tenant had entered into the Rule to confess Lease, Entry and Ouster; but before Plea pleaded gave Judgment to the Plaintiff by Cognovit Actionem. The Landlord upon this prayed (though he had not obtained a Rule to make himself added Defendant) that the Judgment might be set aside. And the Master reported the Practice of this Court to be, that, after the Tenant has entered into this Rule, he cannot give Judgment by Cognovit Actionem; but must enter a Relicta Verificatio; though he did agree, the Practice was otherwise in the Common Pleas. Accordingly, the Chief Justice and Judge Lee absent, the Court set the Judgment aside. And Judge Page said, that the Landlord has a Right to make himself added Defendant, at any Time after the Tenant has entered into this Rule to confess; and that, though he did not actually make the Lease to the Tenant; so as he shews a reasonable Evidence to the Court, that he is the Person in Possession.

When the Tenant has entered into the Rule to confess Lease, Entry and Ouster, how far he cannot give Judgment by Cognovit Actionem.

The King *and* Bolton.

MR. Reeves came now to shew Cause, and said, that he submitted it, no Certiorari would lie in this Case; because it did appear, that the Right of the Cithes came in Question, and where it doth not, the Justices of Peace are made final Judges. For which Reason he submitted it, that the Certiorari was improperly awarded. Then as to the Merits of the Order, he observed, that it was recited in it, that a Demand of the Cithes had been made, and the Twenty Days elapsed, before the Complaint was made; and the Adjudication does require the Defendant to pay Cithes for so much Time subtracted as aforesaid; which, he submitted it, must take in the Time of the Demand, as well as the Time after.

Vide ante

worth on the other Side said, that he had an Affidavit to produce, that the Right of Cities did come in Question before the Justices; and that Evidence of that Sort was offered, but it was refused. And as to the last Matter, he apprehended, that an express Adjudication of these Matters was requisite. Accordingly, the Chief Justice and Judge Lee absent, the Order was quashed.

Philips and Grindel.

Vide ante
131.

MR. Strange came now to shew Cause, and said, that by Law the Bail in all Cases ought to surrender the Principal before the Return of the Capias ad Satisfaciendum against him. He did agree indeed, that the Indulgence of the Court has of late been shewn so far to Bail, as that the Court will stay Proceedings against them, provided they surrender the Principal before the Return is out of two Nihilis upon two Scire facias's, or a Scire feci. But he observed, that that Return, as well as all other Returns, is out by the rising of the Court; yet in the present Case, he said, the Fact was admitted to be, that the Surrender was not made till the Court had actually rose on the Day of the Return. And therefore he submitted it, that the Surrender must have been out of Time. The Court too was of the same Opinion, and said, that they believed this Point had been often so determined. For which Reason they discharged the Rule.

Anonymus.

In Debt on
Bond, how
far the Bail
must justify
themselves
in double the
Penalty of
the Bond.

ON Motion to justify Bail upon a Writ of Error in Debt upon Bond, Mr. Parker submitted it, that the Practice of the Court was, that the Bail need only justify themselves in double the conditional Sum, and not in double the Penal one. But the Court declared it to be otherwise; for, they said, it was uncertain what the Interest upon the Bond might amount to.

Anonymus.

How far the
Court of Ex-
chequer will
not allow a
Plaintiff to
file Exceptions
to an Answer,
after the Defendant
is intitled to move
to dismiss the Bill
for want of
Prosecution.

ON Motion in the Court of Exchequer Baron Carter declared, that the Court had made an Order this Term, not to allow of Exceptions to be filed to an answer, after the Defendant is intitled to move to dismiss the Bill for want of Prosecution.

Answer, after the Defendant is intitled to move to dismiss the Bill for want of

Term. Trin.

5 Geo. II. 1732.

Alh and Mathews.

MR. Reeves now moved for the Court's Direction to the Master in Relation to the allowing Costs. The Plaintiff, he said, had a regular Judgment and Execution; and whilst he was in Possession of the Estate in Pursuance of it, he was at some Charges about the plowing and sowing of the Ground; the Expence of which, he submitted it, the Master ought to allow within the Intention of the Words Costs in the former Rule; or at least the Court would amend the Rule now, and make the Terms of it to be, that the Plaintiff should allow for those Expences. The Court were of Opinion, that this was not within the Meaning of the former Rule; neither did they think proper to make it any Part of this. Accordingly the Motion was disallowed.

Vide ante
139.

Anonymus.

ON Motion to file a Return to a Certiorari, directed to the Commissioners of Sewers, the Court said, that in these Cases they only make a Rule to shew Cause; accordingly did so in the present Case.

When an Order of Commissioners of Sewers is removed up

by Certiorari, how far the Court will not direct that the Return to it shall be filed without making a Rule to shew Cause.

Anonymus.

ON a Motion for an Attachment against the Sheriff of Suffolk, for not returning a Writ, an Affidavit was produced that Hill. 3 Geo. 2 was the Term in which the Return ought to have come in, and that Search had been made among all the Returns of that Term; but no such Return could be found. The Chief Justice doubted, whether the Affidavit was full enough; because the Return might have come in in any of the Terms after, and that would have been sufficient. But it was answered, that when a Return does come in, it is always filed of the Term when it ought to have come in. Accordingly the Motion was granted.

How far Returns to Writs are filed as of that Term when they ought to have come in.

The

The Parish of Horsington *against* The Parish of Northfetherton.

Vide ante
148.

THIS Matter coming now on again, the Court declared their Opinions, that the Order made upon the Parish of Horsington, could not be maintained. And though Mr. Reeves submitted it, that if a Man was removed by the Name of John, and that was his wrong Name, yet he might at any Time be removed by the Name of Thomas, being his right Name; the Court said they took the Law to be otherwise. For there is as much Reason for the Parish, to which he is removed, to take such Exception to the Order of Removal, within Time, as any other. Then as to the two Exceptions taken by Judge Probyn upon the former Argument to the first Order, he and the rest of the Court now agreed, that they could be of no Force. For as to the Order's being said to be made upon due Examination and other Circumstances, they were of Opinion, that the Words other Circumstances should be rejected, as Surplusage; and as to the Ages of the Children being not mentioned, they said, the Justices have adjudged the Parish of Northfetherton to be the Place of the last legal Settlement of the Children; and therefore the Ages of the Children need not be set forth. Accordingly the last Order was quashed, and the original Order confirmed.

The King *and* Lofield

Vide ante
128.

ON Rule to shew Cause, why the Defendant should not pay Costs, for not praying a Tales at the Trial, and so upon the Matter not compleatly carrying down the Record; Mr. Fazakerly said, that the Defendant had obtained a Rule for a special Jury, and had got a Warrant signed by the Attorney General for a Tales; which he actually produced at the Trial, and which the Prosecutor might have made use of, if he had thought proper, and have prayed a Tales upon it. He observed, that at Nisi prius in civil Actions, where the Record is made a Remanet, the Entry always is *pro Defectu Jurator*; yet these Costs are never granted. The same Entry is made upon the present Record; accordingly the Court discharged the Rule.

Wills *and* Williams.

How far the
Court will
give Time
for moving
to change a
Venue.

IN an Assumpsit for certain Toll arising from a Borough in Cornwall; Serjeant Belfield moved to change the Venue from Middlesex into Cornwall. He said, that the Declaration was served but on Saturday Night last, so that it was impossible yet to get an Affidavit from the Defendant who lives in Cornwall, that the Cause of the Action, if any, did arise in Cornwall. However, he had an Affidavit from an Attorney, who was Neighbour both to the Plaintiff and Defendant, and he swears that he believes neither of

of them was ever in Middlesex in their Life-Time. The Serjeant observed too, that the Rules for Pleading would be out on Tuesday next; but he was afraid, if they had moved for Time to plead, it would have been too late after that to have moved to change the Venue. The Court upon these Circumstances made a Rule for shewing Cause on Thursday seven-night, why the Venue should not be changed; by which Time the Defendant's Affidavit would be able to be in Town. And as to enlarging the Time for pleading, they said, that the doing that would be unnecessary. For upon the Matter the Question is whether the Declaration is regularly delivered.

Doyly and Daniel.

MR. Strange moved to discharge a Rule for changing the Venue from Norfolk into Essex, and that the Venue might be laid in Middlesex which was the proper County, upon an Affidavit on the Behalf of the Plaintiff, that the whole Cause of Action arose either in London or Middlesex. He observed, that the Action brought was for Fees in Agency Business; and though the greatest Part of the Business was done in Middlesex, yet some of the Offices are in London, and therefore it was impossible but some of the Business must have arose there. He said, that this Motion is made before the second Term is over, and till that Time the Plaintiff is intitled to move to change his own Venue. For which Purpose he cited Sid. 442. The Court said, that the proper Motion was for Leave to amend the Declaration upon Payment of Costs and that would have the same Effect with a Motion to discharge the Rule for changing the Venue. Accordingly that Motion was granted.

How far the Court will give the Plaintiff Leave to change his Venue.

Anonymus.

IN a Conviction for building a House in London without Party Walls, contrary to the late Act of Parliament, Mr. Theed, moved, that the Prosecutor might have the Leave of the Court to make up this Prosecution; but without Leave he said, he could not do it by the express Words of the Statute of 18 Eliz. 5. The Court said, that they thought that Act did not extend to Convictions; especially not to Convictions made in Pursuance of Statutes that were made after 18 Eliz. Accordingly the Motion was refused.

How far the Court will not give Leave to compound a Prosecution.

Bird and Smith.

How far the Court will not stay the Proceedings in one Action till the Costs of a former one are paid.

THE Plaintiff had brought a former Action as Administrator, but in the Declaration had left Blanks for the Time when the Administration was committed, and for some other Particulars relating to it; the Defendant demurred to the Declaration for this Reason; but the Plaintiff, instead of moving to amend his Declaration, got Leave of the Court upon a *Solus Bar* Motion to discontinue without Payment of Costs, as being an Administrator. Notwithstanding this, the Plaintiff had since brought another for the same Cause as the former. Upon which Mr. Strange moved, that Proceedings in it might be staid, till he paid Costs in the former. But the Court refused the Motion, by Reason that an Administrator is a Person indemnified by the Law from all Costs on commencing any Action.

Cowel and Waller.

Within what Time an Umpire may make his Umpirage.

ON Rule to shew Cause, why an Attachment should not go against the Defendant for not performing an Award, Mr. Marsh said, that the Fact was, that the Plaintiff and Defendant entered into Bonds of Arbitration the beginning of December last, so as the Arbitrators made their Award by the 17th of January following; and if the Arbitrators should not make their Award within the Time given them, then the Parties obliged themselves to stand to such Determination, as any Person, indifferently chosen by the Arbitrators, should make, so as he made his Determination by the 1st of Feb. The Arbitrators chose an Umpire on the 24th of Decem. and that Umpire made his Umpirage on the 14th of January. The Question, he said, upon this was, Whether the Umpirage was good, in as much as it was made three Days before the Time ended, which the Arbitrators had given them for making their Award in. He did agree, that the Case of Mitchel and Harris, Salk. 71. seemed to be a pretty strong Authority to support the Umpirage; but yet he submitted it, that it was distinguishable from the present Case; for there the Umpire was chosen but on the very Day, in which he was confined to make his Umpirage in. He did agree likewise, that there was another Case exactly in Point with the present one, which came before the Court of Common Pleas lately; the Name of it was Ogel and Cogdel, and there the Court did incline to think, that the Umpirage was good; but still there was another Matter, which they founded their Judgment upon, viz. that an Award was pleaded in Bar by way of a Satisfaction, and not Payment in Pursuance of it. He observed then, that if these Cases should be allowed to receive such Answer, as has been offered, there were other Cases in the Books, that strongly enforced the Opinion, which he contended for. And for this Purpose he cited one reported 1 Leo. 32. and Raymond 206. and another in Salk. 70. Mr. Theed argued too of the same Side, but

but, besides enforcing the Point of Law that has been mentioned, took an Exception to the Affidavit upon which the Rule was made, that the Words of it only were, that the Deponent saw the Umpire sign, seal and execute the Umpirage, bearing Date the 14th of January, without saying, that he saw him execute it on that Day. Mr. Wirley on the other Side said, that if this Exception to the Affidavit should have any Weight with the Court, it would be unnecessary now to go into the Argument upon the Point of Law; however he submitted it, that the Court would allow of a supplemental Affidavit, and would not require, that the original Motion should be made de novo. The Court declared the Exception to the Affidavit to be a fatal one, and said, that they never allow a supplemental Affidavit, but where a Matter of Fact wants Confirmation; but here the material Fact has been not at all sworn to. They observed then, that it would not be necessary to declare any final Opinion as to the Point of Law; however, they said, they were all satisfied, that the Umpirage might be maintained. And this not only upon the Authority of the Cases that have been allowed; but upon the Authority likewise of Roll's Abr. 262. (5). and Sir Thomas Jones 167. However the present Rule was discharged.

Anonymus.

THE Defendant having been brought up by Habeas Corpus, Mr. Strange moved, that he might be discharged, upon an Exception taken to the Commitment, that it only charged him generally with insulting three Justices of Peace in the Execution of their Office, without specifying what he said or did, in order that the Court may judge, whether it amounted to an Insult or not. Mr. Marsh on the other Side said, that he himself once took the same Exception in the Case of the Judge of the Court of Twynman, and Mr. Justice Page in the Chief Justice's Absence over-ruled it. Accordingly the Court did so in the present Case, and the Defendant was only bailed.

How far a Commitment shall be said to be good, notwithstanding some Uncertainties in describing the Fact for which the Party was committed.

Burry and Perry.

THIS Matter coming now on again, the Court declared their Opinions, that the Words were actionable in themselves; and for that Reason the special Damage could not intitle the Plaintiff to full Costs; accordingly the Rule was discharged.

Vide ante. 113.

Jacobs and Crosley.

The Certainty in a Plea of Tender, with Regard to describing the Place which the Tender was made in.

IN Assumpsit the Plaintiff declared, that the Defendant agreed, in Consideration that the Plaintiff would transfer to him so many Shares of Stock in the York-Buildings Company, that the Defendant would pay him after the Rate of 11 l. 7 s. per Cent. upon transferring the same immediately after the Opening of the Books. The Plaintiff sets out that the first Day for transferring after the Opening was the 29th of February, that the House called the York-Buildings House, was the usual Place for transferring the Stock of the Company; and that the Hours from Three to Five in the Afternoon, was the usual Time for that Purpose. The Plaintiff then avers, that he was present at the House aforesaid on the 29th of February, all the Time before the Hour of Three till after the Hour of Five, ready to transfer the Stock to the Defendant, but that no one was there ready on the Part of the Defendant to receive the same. The Plaintiff farther declares, that the Defendant has not paid the said Money, nor any Part thereof, in Pursuance of his Contract, which he lays to his Damage. To this Declaration the Defendant puts in a general Demurrer; and the Exception taken to it by Mr. Fazakerly was, that the Tender ought not to have been laid at the House generally, but in that Part of it, where the Books are kept for making Transfers. He observed, that in Case of Tender of Rent for a Piece of Ground, the Law was known to be, that the Tender must be made at the Gate belonging to the Piece of Ground; so in Debt for Rent for a House, the Law was known to be, that the Tender must be made at the Door of the House; and therefore he submitted it, that in the present Case the Tender ought to have been made in that Part of the House, where the Books are kept; for that is the most notorious Place in this Case, as the Gate and the Door are the most notorious Places in the other. The Court said, that they did agree, that the Tender ought to have been made in that Part of the House where the Books are kept; but upon this Declaration they would not intend that there were any other Parts of it. A House, they said, ex vi termini signifies nothing but some Building; and it may be a Building of one Room only, as well as of more. Judge Page said, if the Tender was to have been made at Guild-Hall or Westminster-Hall, it would have been enough to have laid in the Declaration, that the Tender was made at Guild-Hall or Westminster-Hall, without saying it was made at the Door of the Hall, or any other particular Part of it. The Chief Justice observed too, that if the Defendant had pleaded the General Issue in this Case, the Plaintiff would have been obliged to have proved his Tender in that very particular Part of the House, where the Books are kept. However the Court thought this a Matter proper to be farther considered of. Vide Post.

More and Gates.

IN an Assumpsit the Defendant pleaded the Statute of Limitations; to which the Plaintiff replies, that he sued out a Bill of Middlesex in Hill Term, with an Intent to declare in this Action, and that before that Time the six Years did not incur; the Defendant rejoins, that though by the Course of the Court, a Bill of Middlesex is supposed to issue only in Term Time, yet in Fact this Bill of Middlesex was not sued out till the 20th of March following, at which Time the six Years were incurred; and to this the Plaintiff demurs. Mr. Draper argued on the Part of the Plaintiff, and submitted it, that the Court would not allow such Averment out of the Record, as that which the Defendant has attempted; and for this Purpose cited the Case of Jones and Burnet, in the Common Pleas, Pasch. 5 Geo. 1. An Assumpsit was there brought by the Plaintiff, as Indorsee of a Promissory Note, against the Defendant, being an Attorney of the Court, by Writ of Privilege; the Defendant pleaded, that the Attachment issued the 12th of February, and that at that Time the Note was not indorsed by the Plaintiff; the Plaintiff replies, that in Fact he did not sue the Attachment out till the 25th of March, tested the 12th of February, and that the Indorsement was before the Arrest. Upon this Case the Court was of Opinion, that no such Averment could be taken, and thereupon they awarded, quod Breve cassetur, as being sued out before the Time. Mr. Denison on the other Side argued, that Bills of Middlesex and Writs of Latitat were distinguishable from other Process; a Bill of Middlesex has no Teste to it, and a Writ of Latitat may be sued out before the Cause of Action, though the Party cannot be arrested by it before; and for this Purpose cited 2 Cr. 361. and 2 Keb. 198. As to the Case of the Attachment, he observed, that that was considered in the Common Pleas to be in the Nature of an Original. Accordingly the Court ordered this Matter to stand over. Vide Post.

When the Statute of Limitations is pleaded, what shall be said to be a good Rejoinder in such Action. How far an Averment may be allowed, in order to ascertain the Time of suing out a Bill of Middlesex.

The Bishop of London and Lewen and The Mercers Company.

MR. Fazakerly came now to shew Cause, and said, that he submitted in the first place, that no Damages ought to be given in this Case, because the Statute speaks only of such Writs of Error as are brought merely for Clerical Error; but this Writ of Error appeared to be brought with the Intent of having the Opinion of a Superior Court in a difficult Matter of Law. However, if Damages ought to be given at all, he submitted it, that the Quantum of them ought to be only the Interest of the Damages and Costs recovered in the Action below. The Patron, he observed, was the only Person before the Court to pray any Damages; the Damage to the Patron can only arise

Vide ante 64.

from his being kept out of the Money which he was intitled to by the former Recovery; the Patron has nothing to do with the mean Profits of the Living; they belong to the Presentee from the Instant of his Presentation. For the securing them to the Presentee, the Statute of 28 H. 8. 11. has appointed, that whilst the Right of Presentation is under Contest, the Living shall be put into the Hands of Sequestrators. The Sequestrators are bound by that Act to account to the Presentee for all the mean Profits, except such as are allotted for the providing a Curate. So that if the Patron was to recover that, which is found to be the Value of the Church, in Damages, he would recover Satisfaction for that which he was not intitled to; and Mr. Lewen would account for that which he never received. Serjeant Belfield and Mr. Strange argued on the other Side, and said, that they apprehended, the Court would not enter into an Inquiry of what the Intent was in bringing the Writ of Error. The Event of the Writ of Error is the only Rule to determine the Intention of the Parties by; and as the Event has been against the Plaintiffs in Error, it is reasonable they should pay the Damages. Then as to the Quantum of the Damages, they submitted it, the proper Rule to go by was the Value of the Church which is found, and as there were three Years spent between the Commencing the Writ of Error and the determining of it, there ought to be three Times that Value given. They observed, that there was a real Damage to the Defendants in Error, besides that of their being kept out of their Money, viz. that they could not have sold the Advowson in the mean Time. An Advowson is Assets in the Hands of the Heir of the Patron; and the Statute of Westminster 2. 5. has appointed, that the Patron shall have Damages found for him according to the Value of the Church. The Court declared themselves very clear in Opinion, that some Damages ought to be given in this Case; but the Chief Justice in particular said, that he was not satisfied they ought to be according to the Value of the Living. However, this Matter stood over. Vide Post.

Anonymus.

ON Rule to shew Cause, why the Gaoler of the County of Leicester should not deliver over the Possession of the Prisoners, and of the Gaol, to one whom the present Sheriff had appointed to have the Custody of them; Mr. Abney said, that many of the Prisoners were committed in the Custody of former Sheriffs; so that till those Sheriffs had assigned them over to the present Sheriff, he submitted it, the present Sheriff had nothing to do with them. He observed farther, that admitting the former Sheriffs should make such Assignment, yet still this Court would do nothing in an Affair of this Nature, by way of Motion. And of this Opinion, he said, the Court was in the Case of one Stafford. However, in the present Case, the Court thought proper to make a Rule upon the former Sheriffs to assign over their Prisoners to the present Sheriff,

Sheriff, and likewise upon the Gaoler to deliver the Possession of the Prisoners and of the Gaol to the Person, whom this Sheriff appointed to have the Custody of them.

The King *and* The Inhabitants of Utoxeter.

THIS Matter coming on again, M^r. Reeves argued in Support of the Order. And the principal Matter now debated, was, whether the Statute of 13 & 14 Ch. 2. 12. (21.) extended to other Counties, besides those mentioned by the express Words of the Statute. To shew that it did, he cited the Case of The King against The Inhabitants of Stokelane, Doulton and Lucome-Lodge, Hill. 11 Ann. The Justices had appointed Overseers in Lucome-Lodge, in order to make a Removal there. One of the Points before the Court was, whether the Justices could appoint Overseers in this Place, in as much as it was not within any of the Counties mentioned by the Words of that Clause in the Act of Parliament; the Court was of Opinion that they might; and the Reason given was, that the Words of the Act were, and other Counties within *England and Wales*; now none of the Counties mentioned are within Wales, and therefore the Statute must extend to other Counties besides those that are mentioned. However the Court did agree in that Case, that Lucome-Lodge did not appear to be a Place where there was above one House in it; and therefore the Order was held bad upon that Account. The Chief Justice said, that though there were those general Words said in that Case, that the Statute extended to other Counties, besides those mentioned in the Act; yet the particular Case then before the Court, did not come up to the present one; for there the Doubt before the Court was, whether the Statute allowed Overseers to be appointed in other extraparochial Places, besides those lying within the Counties mentioned by the Act. The Court there was of Opinion, that it did, and this Case has constantly been held for Law, though the Lord Chief Justice Holt was always of Opinion, that Overseers could not be appointed in extraparochial Places. However, he observed, that in that Case the Poor must have been left starving, if Overseers could not be appointed; but here there is a Provision for them by the Parish, at large. Upon which the Court thought, that this Matter required farther Consideration; accordingly ordered Copies of the Case to be laid before them. *Vide Post.*

Thrustout *and* Holdfast.

IN an Escamēt the Plaintiff had laid his Demise back so far as 9 Geo. 1. which M^r. Fazakerly said was done, in order to prevent the Defendant giving in Evidence the Statute of Limitations, upon which he moved, that the Demise might be shortened. He did agree, that if the Demise had been laid so far back, only to have intitled the Plaintiff to have brought an Action for mean Profits for so long, the Court would not have

How far the Court will require the Plaintiff, or not, to shorten the Demise which he has laid in his Declaration.

shortened the Demise. But he observed, that if this Method was allowed in this Case the Statute of Limitations would wholly be made ineffectual. For by confessing Lease, Entry and Duffer, the Defendant admits an Entry almost for all Purposes, but to avoid a Fine. And he observed, that at Nisi prius before Mr. Baron Carter in Northumberland, he nonsuited a Plaintiff for laying his Demise above Twenty Years back. The Chief Justice, said, that the confessing Lease, Entry and Duffer would certainly have such an Effect, as Mr. Fazakerly mentioned, but yet he did not see, that the Court could do any Thing in it. However the Court made a Rule to shew Cause.

Reed and Chapman.

How far the Admiralty Court has no Jurisdiction in a Suit for Wages due to a Master of a Ship.

ON Rule to shew Cause, why a Prohibition should not go to the Admiralty Court, Mr. Parker said, that the Foundation of the Suit in the Court below was for Wages due to the Plaintiff as Mate, and the Plaintiff there only suggests farther, that the Master of the Ship died in the Voyage, and that the Plaintiff thereupon for Necessity sake took upon him the Business of Master, and thereupon prays, that in Consideration of that he may be allowed 6l. per Month for that Time, as Master's Wages. Mr. Parker upon this observed, that undoubtedly the settled Rule of the Court was, that for Wages of Mariners or Mates of Ships the Admiralty Court shall be allowed Jurisdiction, but for Wages of Masters they shall not. However in the present Case he submitted it, that the Suit for Wages, as Master, was only an Incident to the other. However the Court was of a different Opinion; accordingly ordered the Rule to stand as to the Wages of a Master, and discharged it as to the Wages of Mate.

Cowper and Norman.

How far the Court will not give Oyer of a Scire facias to assign Errors.

ON Rule to shew Cause, why the Plaintiff in Error should not have Oyer of a Scire facias to assign Errors, Mr. Parker said, that the Fact was, that after Judgment the Plaintiff below became a Bankrupt, and thereupon the Assignees under the Commission have suggested this upon the Roll, and prayed a Scire facias to assign Errors. Mr. Parker observed, that it was a Rule of the Court, that nothing shall be pleaded to a Scire facias to assign Errors, which Point was so determined in the Case of Miles and Wilson, for which Reason he apprehended, that the granting Oyer would be intirely ineffectual; and he took Notice farther, that in the Case of Executors or Administrators suing out these Scire facias's the granting Oyer is always refused. Mr. Yates on the other Side cited 1 Mod. 93. to support the Rule. But the Court thought proper to discharge it.

Nichols and Swordpainter.

IN an Assumpsit brought by the Indorsee of a Promissory Note, the Defendant pleads the Statute of Limitations; the Plaintiff replies a Bill of Middlesex sued out Trin. 5 Geo. 2. and that he did sue it within the six Years; the Defendant in his Rejoinder prays Oyer of the Bill of Middlesex, of the Indorsement of it, and of the Return to it; upon which Oyer it appeared, that the Writ was stamp'd the first Day of October 1731, and thereupon he sets forth the Statute made the 9th and 10th of W. 3. 25. (59.) by which it is provided, that no Officer shall make out any Process, till it is stamp'd, and thereupon answers, that this Bill of Middlesex was not sued out within the six Years, and so concludes to the Country. Upon this the Plaintiff demurs, and shews for Cause, that the Matter of the Rejoinder is all nugatory, and the Conclusion of it wrong. Mr. Agar argued to support it; and said, that a Bill of Middlesex has no Teste to it at Common Law, therefore it could not be known upon the Face of it, when it was sued out; but he apprehended, that the Statute of W. 3. has appointed a Method, by which it may be known upon the Face of it, when the Writ was sued out, viz. by providing, that no Writ shall be made out, till it is stamp'd. But the Court was of another Opinion, and said, that though a Writ is not stamp'd, till after it is made out, yet the Writ does not thereby become void. However the Chief Justice said, that he did not know, but all that Part of the Rejoinder might be rejected, and so the Conclusion be made good. Upon which this Matter stood over. Vide post.

How far an Averment is allowable in order to ascertain the Time when a Bill of Middlesex was sued out.

When the Statute of Limitations is pleaded, what shall be a good Rejoinder in such Action.

Bigley and Pechey.

IN Trespass for taking Goods, the Defendant pleads, that at the Time of the Trespass supposed to be committed, Richard, Lord Bishop of Winchester, was seised in Fee of a Market in the Town of Croydon, and that the Defendant, as Bailiff to the said Bishop, distrained the Goods in Question for Damage-feasant. The Plaintiff replies, that the late King by his Letters Patent granted the said Market to Jonathan, Lord Bishop of Winchester, and alledges, that at the Time in the Declaration mentioned he brought the Goods into the said Market for Sale, till the Defendant took them of his own Wrong. The Defendant by his Rejoinder craves Oyer of the said Letters Patent, and pleads, that the Plaintiff brought his Goods there without Payment of Toll, upon which the Defendant desired him to remove away his said Goods, which the Plaintiff did not notwithstanding, and thereupon the Defendant distrained them, as he well might. To this the Plaintiff demurs, and shews for Cause, that the Defendant has demanded Oyer of Letters Patent, which were not pleaded with a Profert; that he has not alledged, that any Toll was due; nor

How far Toll shall not be said to be due.

for what it is due; nor in what Manner it is due; nor that any was denied; and that the Rejoinder is a Departure from the Bar. Mr. Draper now argued for the Plaintiff, and said, that all Markets were of a publick Nature, free for all People to come into; and therefore, admitting that Toll was due, yet still by refusing to pay it, the Plaintiff would not become a Trespasser upon the Soil of the Market. For which Reason the Goods brought by him into the Market, could not be distrained for Damage-feasant; and for this Purpose he cited, 3 Cro. 75, 627. But he submitted it, that Toll was not due in this Case; because it is not mentioned in the Letters Patent, and is not due of common Right as incident to a Market; in Proof of which was cited 2 Inst. 221. and Lutw. 1329, 1336. He observed farther, that the Nature of Toll was such as to be due from the Buyer only, and not from the Seller; and for this was cited 2 Inst. 220. And took Notice, that in all Demands of Toll the Quantity of the Toll ought to be set forth, that the Court may judge, whether it was reasonable or not, 2 Inst. 222. and the Nature of it ought to have been set forth, because some is in Specie and others not, 2 Rolls Abr. 123. Serjeant Belfield argued on the other Side, and did agree, that the Rejoinder could not be maintained; but he submitted it, that the Replication was bad; and if so Judgment must be for the Defendant. He observed, that the Plaintiff has admitted by his Replication, that he brought his Goods to Sale into the Market; but before he did so, the Serjeant submitted it, that the Plaintiff ought to have tendered Stallage to the Lord's Bailiff; and for this Purpose he cited a Case determined 15 Jac. 1. in Rolls Abr. 123. relating to the Town of Cambridge. The Court declared themselves by no Means satisfied, that Toll or Stallage was due to a Market without an express Clause in the Grant or Prescription for that Purpose; but if these Duties were incident to Markets of common Right, they thought that Stallage could not be necessary to be tendered before the Goods were brought into the Market, and that it was enough to do it, after they were brought in. And as to the Case cited out of 2 Rolls Abr. 123. the Chief Justice and Judge Page declared, that they doubted, whether it was Law. Accordingly Judgment was given for the Plaintiff, unless Cause on Thursday next.

Traverse and Wood.

When a Writ of Error is brought upon a Judgment in Ireland, the Method which the Court makes use of to hasten the Plaintiff in Error to assign his Error.

UPON a Writ of Error on a Judgment in Ireland, Mr. Wynn moved, that the Defendant in Error might be at Liberty to sign a Nonpros, in case Errors are not assigned within a Week's Time after Notice stuck up in the Office, there having been one Notice of that sort given already. Mr. Strange said, that there have been several Rules made by the Court to this Purpose; accordingly they made such Rule in the present Case.

Anonymus.

ON Motion by M^r. Floyd, that a Submission to an Arbitration might be made a Rule of Court, it appeared, that the Consent was only, that the Award should be made a Rule of Court. M^r. Monday said, that the Court has often refused making Submissions to Arbitration Rules of Court upon such Consent; accordingly this was refused in the present Case.

What shall not be said to be a sufficient Consent that a Submission to Arbitration be made a Rule of Court.

Twiseldon and Newel.

ON Rule to shew Cause, why a Scire Facias to assign Errors should not be quashed, for its being tested on the 22d of May, being on Monday and the last Day of Easter Term, and returnable Crast. Trin. being the Monday Fortnight after; so that there were not fifteen Days between the Teste and the Return, without taking both Days inclusive, whereas in these Computations one of the Days ought always to be taken exclusive. M^r. Amroe said, that he apprehended, this was help'd by the Statute of 16 Ch. 1. 6. (7.) M^r. Draper said likewise, that he remembred the same Rule discharged upon his Motion. Accordingly the Court discharged this Rule in the present Case.

What shall be said to be a good Scire Facias to assign Errors.

Anonymus.

Serjeant Girdler moved, that a Man who was committed for a Contempt, might be discharged, upon Account of there never having been any Interrogatories filed against him, though he had lain in Custody for a considerable Time. M^r. Masterman said, that by the Practice of the Court, Interrogatories need not be filed against a Man, till within four Days after Security given by the Party to answer them. The Court were of Opinion, that the Party's giving Security was not necessary as he is in Custody; and that the four Days should be computed from the Time of the Party's being sworn to answer them. Accordingly the Party was sworn for this Purpose.

When a Person is in Custody for Contempt, how far the Court will not discharge him, notwithstanding the Delay of exhibiting Interrogatories against him.

Nichols and Swordpainter.

MR. Bootle Junior now argued for the Plaintiff, and submitted it, that though the beginning of the Rejoinder was nugatory and Surplusage, yet by the Plaintiff's demurring to it, and shewing that Matter specially for Cause, it was made material and could not be rejected. For this Purpose he cited a Case in 2 Lut. 1445. and 39 H. 6. 35. He said farther, that he apprehended, that upon the whole of this Record Judgment must be for the Plaintiff, notwithstanding it should be admitted, that the Action did not commence till the 1st of October last. For the Note which the Plaintiff has declared upon, is payable six Months

Vide ante 161.

Months after Date, and bears Date the 2d of April 1725. These Months, he did agree, must be computed as Lunar ones, and not according to the Calendar; yet still they did not end till the 7th of October 1725. Now the Defendant by his own Argument admits, that the Action was commenced the 1st of October 1731; and consequently well brought within the Time limited by the Statute of Limitations. The Court declared, that they were well satisfied, that the Beginning of the Rejoinder might be rejected, as Surplusage, notwithstanding the special Demurrer for that Cause. But as to the other Point, they thought proper to consider of it.

Anonymus.

How far a special Agreement made between an Attorney and his Client shall be said to be binding.

IN an Action brought by an Attorney for fifty Guineas upon a special Promise of the Defendant, for Business done in his Profession; Mr. Hussey moved, that it might be referred to the Master to see what was due, and that upon paying the same, all Proceedings might be staid. The Court said, as this Action was founded upon a special Agreement, they could do nothing in it. Accordingly the Motion was refused.

Ball and Knight.

Vide ante

MR. Draper now Argued for the Plaintiff in Error, and submitted it, that the Custom to award a Tales was in itself void. The first Statute which gave a Tales, he said, was that of 35 H. 8. 6. and that was at the Prayer of the Plaintiff; the next Statute was that of 14 El. 9. and that was at the Prayer of the Defendant. But there is an express Clause in the Statute of 35 H. 8. that that Statute shall not extend to Cities or Towns Corporate; and therefore there is no Pretence, that the Tales in the present Case can be supported by that Act of Parliament. The Question therefore is in Relation to the Validity of the Custom. The Rule of the Law, he apprehended, was, that no Custom of an inferior Court shall be allowed of, which breaks in upon the fundamental Rules of Proceeding in the superior Jurisdictions. For this Reason, a Custom in an inferior Court to try an Issue by six Jurymen, was held void in 1 Cr. 259. so a Custom to award a Capias before a Summons, was held the same, in 1 Rol. Ab. 563. And besides, he observed, that the very Custom now in Question was doubted to be void, in the same Page of Rol. Ab. and there is another Case there cited, where this Custom was absolutely disallowed of. That Case was determined 11 Ch. 1. and he produced the Roll now in Court, where the Judgment below appeared to be reversed. He took Notice farther, that the Custom, as laid in the present Record, was particularly bad; for the Custom is laid to be, to chuse a Tales de Circumstantibus in general, without saying de Vicineto; whereas the Statute of H. 8. appoints the Tales to be of Men living within the Body of the County; and therefore he submitted it, that it was absolutely unfit and unreasonable, that the

the Tales should be of Men residing in the remotest Part from that Jurisdiction, provided they happened to be standing there present. Serjeant Eyres argued on the other Side, and said, that he apprehended the Rule of Law to be, that no Custom in an inferior Court, shall be held to be against Law, merely because it differs from the established Rules of Proceedings in other Jurisdictions, unless such Custom be in itself an unreasonable Custom. For this Reason a Custom in Chester, that the Plaintiff in Error should pay Costs, where the Judgment is affirmed, was allowed, though it was against the established Rules of Proceeding in the Courts above, to give Costs in any Cases by the Common Law. To which Purpose was cited Rol. Ab. 564. So where a Custom was in an inferior Court, that in an Action upon Bond, the Defendant might acknowledge the Action, but pray that the true Sum might be inquired into, which was bona fide owing, that Custom was allowed, as appears by 3 Cro. 894. and 1 Mod. 96. The Question therefore was, whether the present Custom was an unreasonable one, or not. To shew that it was not, he said, he thought, no other Proof was requisite, than that the Statute of H. 8. has made such Practice universal in all the Superior Jurisdictions. And besides, he observed, that in 2 Rol. Ab. 672. it is actually held, that such Custom to award a Tales is good. The Chief Justice and Judge Probyn inclined to be of Opinion that the Custom was good; Judge Page, that it was not, upon Account of the Generality of it, that the Tales should be granted of any Persons, that happened to be present. Accordingly the Matter was ordered to stand over. Vide Post.

The King and The Inhabitants of Ruffborough.

THE Defendants having been indicted at the Sessions, for not repairing a Highway, and the Right solemnly tried at the Assizes, by Consent of all Parties, and found, that they were not bound to repair it; and a single Justice having since taken upon himself to present these same Persons for not repairing this Highway, which Presentment had been removed up into this Court by Certiorari; Mr. Fazakerly moved, that Proceedings upon this Presentment might be stay'd; and accordingly the Court made a Rule to shew Cause. Vide Post.

How far the Court will stay Proceedings on a Presentment for not repairing a Highway.

Oldham and Long.

ON Rule to shew Cause, why a Plea to the Jurisdiction of the Court should not be set aside, for there being no Affidavit annexed to it; Mr. Parker said, that this was an Action of Assault and Battery, and the Plea is, that the Assault and Battery arose in the County Palatine of Chester, and that the Defendant is now, and was at the Time, when the Action arose, resident within the said County Palatine. The Substance of the Plea, he observed, was good beyond all Manner of Dispute; and therefore the only Objection against it could be, that

How far a Plea to the Jurisdiction of the Court is necessary to be verified by Affidavit.

there was no Affidavit annexed to it. Now as to that, he said, the Fact was, that no Affidavit, verifying the Plea, was made at the Time the Plea was put in, and the Attorney ordered his Clerk to annex it to the Plea; but the Clerk by Mistake omitted it. He observed, that there was a Case in this Court very much like the present one, which was that of Solales and Durant, Hill. 1 Geo. 2. There on a Rule to shew Cause, why a Plea of Coverture should not be set aside for there being no Affidavit annexed to it, the Court discharged that Rule on Mr. Dival's Motion, upon producing to the Court an Affidavit, verifying the Marriage. And he submitted it, that there was great Reason for this Indulgence; for the Words of the Statute for the Amendment of the Law are, that no such Plea shall be received, unless there is an Affidavit annexed to it, or other probable Matter to induce the Court to believe the Truth of it. The Court said, that in the Case cited, the Plaintiff confessed the Fact; but in the present Case he has not done so; accordingly the Rule was made absolute.

Anonymus.

How far the Court will not grant Informations against Church-wardens.

MR. Agar moved for an Information against the Church-wardens of a Parish, for refusing to let the Parishioners meet in the Church about publick Business, in Pursuance of a Notice given there for that Purpose. But the Court thought this an Offence not great enough to require an Information; accordingly refused the Motion.

The King and Osborn.

Vide ante 138.

MR. Strange coming now to shew Cause, he submitted it, that the present Case was exactly like that of The King and Orm before cited; for there certain Ladies were reflected on, that were unknown, and here certain Jews were. But the Court said, that in the present Case it is related in the Paper, that the Fact there told, is a Fact which the Jews have frequently done; and therefore the whole Community of the Jews are struck at. And wherever that is the Case, they thought this Court ought to interpose. Accordingly they made the Rule absolute.

Trolop and Trolop.

What shall not be said to be a sufficient Plea of a Purchase for a valuable Consideration without Notice.

Scac. **A**N Original Bill had been filed against the Defendant and his Father, setting forth, that the Grand-father died seised of certain Lands in Fee-simple, and by his Will devised the same to the Plaintiff. The Bill farther suggested, that the Father had Knowledge of this Will, but secreted it, and kept the Possession against Right and good Conscience, and therefore the Bill prayed a Discovery. The Father put in his Answer to this Bill, and thereby denied the whole of this Mat-
ter

ter that was suggested. The Son put in his Answer likewise, and owned, that he had heard of there being such Will, but knew nothing of it. The Father died, and thereupon there was a Bill of Revivor against the Son, and likewise a Supplemental Bill, suggesting, that the Will had been kept in the Hands of one M^r. Collins, a Solicitor, and that immediately after the Death of the Father, it was delivered into the Hands of the Son. To this Supplemental Bill the Son put in a Plea, that in 1690, his Father was seised of the Lands in Question, and that upon a Contract of Marriage being depending, he levied a Fine, and settled the same to the Use of himself for Life, the Remainder to his intended Wife for Life, the Remainder to his first and other Sons in Tail Male; that he was the first Son, and so pleaded this Matter in Bar of a Discovery. The Validity of this Plea had been before argued, and the Chief Baron and Baron Cummins were of Opinion, that it should be over-ruled; but Baron Carter and Baron Thompson were of Opinion that it ought to stand. The Court having been thus divided, the Plaintiff applied by Petition to Sir Robert Walpole, Chancellor of the Exchequer, informing him that no Judgment could be given in this Case, unless he thought proper to attend; and that this Plea would be set down in the Paper for such a Day, at which Time his Presence was desired. The Chancellor did attend in Pursuance of this Petition; and now the Matter was again solemnly argued before him and the rest of the Court. The Barons continued respectively of their former Opinions; and now the Chief Baron and Baron Cummins declared their Objections against the Plea, and said that it did not amount to a Purchase for a valuable Consideration, without Notice. They did agree, that upon a Marriage Settlement a Wife is considered as a Purchaser for a valuable Consideration, and that the Children are considered as Purchasers likewise. But then they observed it was strictly necessary, that the Wife should have no Notice of any Defects in the Settlement at the Time of the Execution of it, in order that the Children may have the Benefit of Purchasers without Notice. They did agree, that it was impossible for the Children to have Notice; because they are not born at the Time of the executing the Settlement. They did agree likewise, that it could not be incumbent upon the Son to have pleaded in this Case, that his Mother had no Notice; for a Plea is upon Oath; and no Man can be obliged to swear positively to that which cannot be of his own Knowledge. However, they said, he might have sworn, that he did or did not believe that his Mother had no Notice; and so far he ought to have sworn. For which Reason principally they were of Opinion, that the Plea was bad. They said likewise, that the Defendant ought to have set forth in his Plea, that his Father was seised of such an Estate, as he might have levied a Fine of; whereas in the present Case it does not appear, that he was seised of any greater Estate than that for Life only; and this was the other Objection to the Plea, which they thought fatal likewise. The other two Barons declared their Opinions to be, that the setting forth what the Defendant believed, was
not

not necessary in a Plea, because it is a Matter not traversable. And as to the not letting out the Nature of the Father's Estate, they were of Opinion that it was set out with sufficient Certainty. The Chancellor agreed with the Chief Baron and Baron Cummins; accordingly the Plea was over-ruled. *Ex relatu.*

Chapman and Lamb.

How far
goods which
a Person buys
abroad for
his own Use,
shall pay Cu-
stom, or not.

IN an Action brought against the Defendants for taking fourteen Shirts, six Handkerchiefs, a Night-Gown and a Velvet Cap, they justified as Custom-house-Officers; and upon the Trial a Case was made for the Opinion of the Court; wherein it was stated, that the Goods in Question were Foreign Goods, and bought by the Plaintiff in his Travels beyond Sea; that the Goods were necessary wearing Apparel for the Plaintiff, and bought by him for his own private Use, and not by way of Merchandize; that the said Goods were landed by the Plaintiff at Dover, and that the Defendants, as Custom-house-Officers, demanded Duty for them; but that the Plaintiff refused to pay any, whereupon the Defendants seized them. *Mr. Kettelby* argued for the Plaintiff, and said, that he apprehended, the only Statute, which gave any Colour to support this Seizure, was that of 12 Ch. 2. 4. (3.) But he submitted it, that upon examining that Statute it would appear, that no Goods are seizable by Virtue of it, but such as are bought with an Intent to be sold again by way of Trade and Merchandize; and the Case has expressly stated it, that the present Goods were not so. He cited too *Vau. 165.* for this Purpose. *Mr. Reeves* on the other Side argued and submitted it, that it would be a Thing of dangerous Consequence to the King's Customs, to put the Officers into an Inquiry concerning the Intent of the Party buying Foreign Commodities; the only Rule, which he apprehended the Officers of the Customs could go by, was, the Goods being foreign or not Foreign; for which Reason he conceived, that if a Man brought over a Hoghead of Wine with him, there was no Pretence to say, but the Wine must pay the Duty. The Court seemed to agree the Case put by *Mr. Reeves*; but thought the present one distinguishable from it. However, upon the Attorney General's desiring to be heard on Behalf of the Crown, the Matter was ordered to stand over. *Vide Post.*

Ashley and Bradwood.

When a For-
medon in
Remainder
is brought,
what shall be
said to be a
good Plea in
such Action.

UPON a Writ of Error in a Formedon in Remainder, brought for Lands lying in the County Palatine of Lancaster, it appeared, that the Demandant had counted, how that Thomas Enquison being seized of the Lands in Question, in his Demesne as of Fee, in 1572 devised the same to Alexander his eldest Son, in Tail; the Remainder to Thomas his second Son in Tail; the Remainder to William his third Son in Tail; that Thomas the Father, and Alexander and Thomas his Sons, are all dead,
without

without Issue, by Means of which the Lands belong to the Demandant, as Heir of the Body of William. To this the Tenant pleads, that Thomas the Son, Frater & Hæres to Alexander, made a Deed of Feoffment of the said Lands with Warranty, which Warranty descended upon the Demandant. The Demandant put in an immaterial Replication, to which there was a Demurrer; and therefore the single Question arose upon the Validity of the Plea, whether this Warranty should be considered a collateral Warranty; and if so, the Title of the Demandant was barred; or whether it should be considered a Warranty commencing by Disseisin, for want of its being said, that Alexander was dead without Issue at the Time of the Feoffment; and if so, the Title of the Demandant continued good. Mr. Bootle Junior argued for the Tenant, and submitted it, that in as much as the Tenant had pleaded that Thomas the Son & Hæres to Alexander had made the Feoffment, that was a sufficient Averment, that his Brother was dead without Issue, at the Time of the Feoffment; and if the Demandant had joined Issue upon that Fact, and it had been proved upon Evidence, that Alexander was not dead without Issue at that Time, the Issue must have been found for the Demandant. For which Purpose he cited Dyer 299. Hob. 51. and said, that the same Matter is pleaded so in Coke's Entries 308. and Rastall 361. However the Court had some Doubt, whether the Plea was good in this Respect. Accordingly the Matter was ordered to stand over. Vide Post.

Anonymus.

MR. Kettleby moved for a Prohibition to be directed to the Deputy Earl Marshal of England for holding Plea in a Court, called The Court of Honour, against one Mary Radbourne, in a Suit instituted against her, for bearing the Arms of her late Husband, without having proper Authority. He submitted it, that if there was such a Court, it could only be holden before the Constable and Earl Marshal; and for this Purpose cited a Precedent in Lilly 316, 228. Accordingly a Rule was made to shew Cause.

How far the Earl Marshal alone, without the Constable of England, has a Right to hold Plea in Matters relating to Heraldry.

Anonymus.

ON Rule to shew Cause, why a Prohibition should not be directed to the Bishop of Lincoln, to prevent his executing a Sentence given by his Commissaries against Dr. Wilmor, upon a Visitation at the Doctor's Suit against King's College in Cambridge; the Chief Justice took an Exception, that it did not appear upon the Face of the Proceedings below, that the Commissaries had not a Jurisdiction, for which Reason he thought, that the Doctor was too late now to move a Prohibition, merely upon a Suggestion of certain Statutes in the College, to shew, that the Commissaries had no Jurisdiction. He said, he thought this Matter ought to have been pleaded below. And cited the

How far a Prohibition may be granted, or not, after Sentence.

Cases of Moulton and Sands and Doyle and Hunt, where the Court was of Opinion, that a Prohibition would not lie to the Admiralty Court after Sentence, unless it appears upon the very Face of the Proceedings, that they have no Jurisdiction; and said, that he could not see any Distinction between those Cases and this. However upon Mr. Reeves's desiring to consider of this Exception, the Court enlarged the Rule. Vide post.

The Bishop of London and Lewen and The Mercers Company.

Vide ante
108.

THIS Matter now coming on again, the whole Court declared their Opinions to be, that the Rule for ascertaining the Damages in this Case ought to be the Interest of the Damages recovered in the Court below, to be computed from the Time of the Plaintiff's bringing the Writ of Error to the Time of Affirmance of the Judgment. Accordingly under this Direction they refer'd it to the Matter to settle what the Interest came to.

The King and The Inhabitants of Utoxeter.

Vide ante
135.

THIS Matter coming now on again, Judge Lee said, that he doubted, whether the Appeal by the three Villages was not regular enough. Then as to the Power of the Justices upon Appeal, he observed, that it was certain, they were not confined either to quash or confirm the Rate appealed from; but they might make a new one; and he did not know, whether they were tied up to precise Forms in their Orders. The Statute, which gives these Appeals, he observed, requires, that they should be by the Party grieved; but he remembered a Case in this Court, which was determined upon Debate and Search of Precedents, that an Order made upon such Appeal would be good, though it did not appear upon the Face of it, that the Appeal was by the Party grieved; and the Order was confirmed notwithstanding such Exception. Then as to the Form of the present Order, he did agree, that the Sessions had declared their Opinion in it, that the three Villages ought to maintain their own Poor separately; but then there comes afterwards another Clause in the Order, which seems intirely independent of the former Clauses, and in these Words, And we do farther order, that so much of the Rate, as requires the Parish of Utoxeter at Large to be any Ways contributory to the Relief of the Poor of the three Villages, shall be quashed. So that he did not see, why this Order was not a general Order. For which Reason he thought it might be confirmed. But the rest of the Court inclined to be of another Opinion. Accordingly the Matter was ordered to stand farther over. Vide post.

Anonymus.

THE Plaintiff having discontinued his Action, which he brought against an Officer, who justified as such in the Execution of his Office, M^r. Draper moved for double Costs upon the Statute of 4 Jac. 1. 3. Accordingly a Rule was made to shew Cause.

How far double Costs ought to be granted upon the Statute of 4 Jac. 1. 3.

Haycock and Yeates.

A Writ of Elegit having been sued out requiring the Sheriff to deliver Possession of a Moiety of the Defendant's Lands in Pursuance of a Judgment signed by the Plaintiff 30th of November last; and there having been a Mistake as to the Day when the Judgment was signed in the Inquisition taken in Pursuance of the Elegit; the common Serjeant moved, that the Inquest might be amended in this respect by the Writ. The Court said, this would be to alter what the Jury have found upon their Oaths. However they made a Rule to shew Cause.

When an Inquisition is taken upon an Elegit, how far the Court will allow an Amendment of it, or not.

The King and Empson.

MR. Crowle came now to answer the Objections, that were before taken, and mentioned all of them, except the third, viz. its not appearing, that Howdenshire was within the Jurisdiction of the Commissioners. To the first, he said, he did agree, that the Introduction to the Order was by way of Recital; but the Order itself is set forth in hæc verba; for which Reason he submitted it, that the Introduction, which was only the putting in of the Clerk without any Authority, might be rejected as Surplusage. To the second, he observed that the Book of Pains was a Technical Word appropriated to the Commissioners of Sewers; and therefore could only belong to them. To the fourth, he said, the Commitment was not for making Rasures in the Book, but for not answering, whether he had made any; for which Reason it could not be material to set out in what Places the Rasures were; the Contempt in not answering, whether he had made any at all being the Foundation of the Commitment. To the fifth, he submitted it, that by answering the present Question the Defendant would not accuse himself; for though he should have answered it in the strongest Manner against himself, viz. that the Book was not in the same Condition, when it was delivered to him, yet this would be far from convicting him for altering it; for the Book was intrusted to the Care of every one of the Jurymen, as well as the Foreman; and therefore it might have been any one of them, that altered it; and there was as much Proof of that, as there was of the Defendant's doing

Vide ante 66.

doing it. To the last Objection, he said, that the Defendant is convicted for refusing to take the Oath; and therefore it could not be said to be uncertain whether the Oath was tendered. The Chief Justice declared, that he thought all the Exceptions were answered but the last but one; and as to that, all the Court agreed it to be fatal; for if the Defendant had answered, that the Book was not in the same Condition, when it was delivered to him, it would have been a very strong Evidence against him, as he was Foreman of the Jury; and would have turned the Proof upon him, that some other of the Jurymen altered it. Accordingly for this Reason the Conviction was quashed.

The King and Britton.

Vide ante
147.

THIS Matter coming now on again, M. Fazakerly would have argued for the Prosecutor; but the Court thought it so clear a Point against him, that they immediately gave Judgment for the Defendant. And Judge Lee said, that the Case of *The Queen and Robinson*, Trin. 13 Ann. was the first determined upon this Point after the Union.

The King and Walker.

What shall
not be said
to be a good
Indictment
for not re-
pairing a
Highway.

IN a Writ of Error upon an Indictment for not repairing a Highway, M. Vauks took two Exceptions to the Indictment, first, that the Way was only laid to be Via Regia, and not communis & alta Via Regia; secondly, that a private Person was indicted for not repairing it, and it was not laid, that he was bound to do it ratione Tenuræ, or any other way. The Court said, that either of these Exceptions was fatal; accordingly they reversed the Judgment.

Anonymus.

How far the
Court will
not require a
Person to en-
ter up his
Judgment,
notwith-
standing
there will be
an Occasion
for the Judg-
ment in or-
der to indi-
cator of
Perjury.

THE Plaintiff having been nonsuited by Reason of one of his Witnesses giving an Evidence, that was unrepented, and the Witness having thereupon been indicted for Perjury, M. Bootle, Jun. moved, that the Defendant in the first Action might be obliged to enter up his Judgment upon the Nonsuit, in order that this Judgment might be given in Evidence upon the Indictment against the present Defendant. But the Court thought they could do nothing in it; accordingly the Motion was refused.

The King *and* The Bishop of Lincoln.

MR. Reeves now cited 12 Rep. 77. in Point, and said, that he ^{Vide ante} submitted it, that would be enough for making the Rule absolute, in order that the Parties may declare in Prohibition. But Mr. Filmer on the other Side mentioned the Case of Barker and Wharton, where this Point is determined directly to the contrary; and so the Chief Justice said it was in the Case of Wright and Allen, Mich. 10 G. 1. for which Reason he thought that the other Cases could not be Law. Judge Lee said, that he was well satisfied, that in every settled Jurisdiction, it is too late to apply for a Prohibition, unless Defect of Jurisdiction appears upon the Face of the Proceedings. But the Doubt with him was, whether in those Instances, where there is a Jurisdiction only in particular Circumstances, the Admission of the Party can preclude the Court from supporting the Right of the Crown. For this Purpose he cited 2 Inst. 602, where he did not think that what is laid down could be maintained, unless it was applied to some such Case as this. Accordingly the Court enlarged the Rule farther. *Vide Post.*

Holt *and* Ward.

THE Chief Justice now delivered the Resolution of the ^{17.} *Vide ante* 12. Court. He said, the Declaration sets forth, that on the 14th of March 1726 there was a Discourse between the Plaintiff and Defendant concerning Matrimony, and in consideration that the Plaintiff promised the Defendant to marry him, when she should be requested, the Defendant promised to marry her, when he should be requested; the Declaration avers, that the Plaintiff was always ready to marry the Defendant, and that the Plaintiff did on such a Day request the Defendant to marry her, but he refused, which she lays to her Damage. There were two other Counts in the Declaration, much to the same Purpose. To this the Defendant pleaded two Matters; one, the General Issue; the other, that the Plaintiff was within Age, viz. Seventeen, at the Time of the Promise. To the last of these Pleas the Plaintiff demurred, and shewed for Cause, that it amounted to the General Issue; and upon the Trial of the first, the same Point came in Question, which now does upon Demurrer; accordingly there was a Case upon Evidence made for the Opinion of the Court; and the single Question was, whether in as much as the Plaintiff was an Infant at the Time of the Promise, there was a sufficient Consideration on her Part to found the Promise upon, made by the Defendant. The Chief Justice observed, that in Carter 236. Lord Vaughan made a Doubt, whether an Action could be maintained upon a Promise of this Sort made by any Person whatsoever. And in the Case of Kite and Harrison, Lord Holt was of Opinion, that such Action could not be maintained by a Man, though it might by a Woman; for that the Loss of Marriage cannot

cannot be esteemed to be a Disadvantage to him, though it may to her. However, he said, the Law was in both these Points settled at this Day; and now there was no Question to be made, but such Action would well lie; and that by the Man, as well as the Woman. The Difficulty then arises from the Circumstances of the present Case, viz. in as much as there was clearly no Method to compel the Plaintiff to perform her Part of the Promise by the Common Law, and by the Arguments of the Civilians he thought there was none in the Ecclesiastical Court. But still the Court, he said, had come to this Determination, that the Promise on the Part of the Infant carried with it an Appearance of Benefit to the Infant; for which Reason they were of Opinion, that it was not void, but voidable only. The Consequence of which, he observed, clearly was, that at the Time of the making it, there was a sufficient Foundation for the Defendant to support a Promise upon it. The Cases upon which the Chief Justice founded his Argument, were principally 1 Cr. 303, 502. 1 Sid. 41. 2 Sid. 109. Ven. 51. Mod. 25. Sir William Jones 161. Accordingly the unanimous Opinion of the Court was, that the Action was well maintainable. Upon which Serjeant Chappel said, that upon a former Motion for a new Trial for excessive Damages (the Damages being 2000 Pounds) the Court reserved the Consideration of that Question till this was determined; for which Reason the Court now made a Rule to shew Cause, why a new Trial should not be granted. Vide Post. *J. C. 176.*

Hewke and Whight.

When an Action is brought against a Person for not taking away his Tithe, how far by the Common Law Notice of Tithing need not be proved.

Bury Assizes. IN an Action upon the Case brought against the Defendant, Proprietary of the Tithes of the Parish of Sutton, for not taking away the Tithe of Oats, Peas, and Rye, after they were set out; it was insisted on by the Counsel for the Defendant, that the Plaintiff ought to have given Notice of tithing, after the Tithe set out, and before the nine Parts were removed and carried away from the Tenth. Judge Lee, who tried the Cause, agreed, that such Notice was necessary to be given, according to the Ecclesiastical Law; but by our Law he thought it not necessary. And Mr. Proctor cited the Case of Chaise and Way, where this Point is expressly adjudged. Accordingly the Defendant consented, that the Jury should find a Verdict for the Plaintiff.

The King and Smith.

How far a Person cannot be indicted of Robbery, by Reason that at the Time he took the Goods, he claimed a Property in them.

Bury Assizes. IN an Indictment against the Defendant for robbing one Thomas Holder, a Custom-house Officer, of Goods belonging to Persons unknown, the Fact appeared upon the Evidence to be, that Holder, who lived at Ipswich, had lately made a Seizure of the Goods in Question, for being run, and hid clandestinely in a Barn belonging to a Town near that Place. When Holder was riding off with these Goods, which he

had made a Seizure of, and carrying them upon the Road towards Ipswich, the Defendant met him, demanded the Goods, insisting upon it that they were his, presented a Pistol to him, and threatened to kill him if he did not deliver them. These Goods were a Parcel of Tea. And upon that Holder said to the Prisoner, if I was to give you Part of them, you would laugh at me another Time. No, the Prisoner told him, he would not, and he would be contented. Holder upon this delivered him Part of the Tea; and for taking this Parcel of Tea so delivered to him, the Prisoner was indicted of Robbery. The Counsel for the King insisted, that by the Seizure Holder gained a special Property in the Tea, and though he made the Offer of parting with some of it, to save the rest, yet that Offer was made under Terror of the Threat, and consequently could not lessen the Offence. However, Judge Lee was of Opinion, that as this was only a Claim of Property by the Prisoner, the Indictment could not be maintained; accordingly the Prisoner was discharged.

Term.

Term. Mich.

6 Geo. II. 1732.

Holt and Ward.

Vide ante.
173.

MR. Reeves came now to shew Cause, and said, that he submitted it, unless the Damages were very excessive, the Court would not interfere. But he apprehended, that considering the Circumstances of this Case, the Damages were very Moderate; for the Defendant had an Estate in Possession of 1100 l. per Ann. though the Plaintiff had little or no Fortune, and the Courtship between them was carried on for above three Years without Intermission. In the Case of one M^r. Alsop, a Clergyman of Oxford, the Jury gave the same Sum, as they have done here, viz. 2000 l. and that Verdict was never attempted to be set aside for the Excessiveness of the Damages. He observed farther, that in Actions of Scandalum Magnatum the Court never sets aside the Verdict upon such a Reason. The Case of The Duke of Richmond was a late Instance of that in the Common Pleas; the Jury there gave 10000 l. Damages, a new Trial was moved for on that Account, but the Court refused to do any Thing in it. The Court in the present Case thought proper to recommend an Accommodation to the Parties; accordingly nothing was farther done in this Matter at present.

Anonymus.

How far the
Court will
grant an In-
formation a-
gainst
Church-war-
dens, or not.

MR. Kettleby moved for an Information against one of the Church-wardens and one of the Overseers of the Parish of Lambert, for causing a Libel to be read in the Church against the Trustees and Managers of a Workhouse there, by charging them (without mentioning any of their Names in particular) with being guilty of suffering several Abuses in that Trust by their pretended Authority. Accordingly a Rule was made to shew Cause.

Bailey and Dolben.

IN an Action upon the Case for Goods sold and delivered, **M**r. Taylor moved in Arrest of Judgment, that the Declaration was in Latin, whereas by the Act of Parliament, that passed the last Sessions, it ought to have been in English, by Reason that the Damages recovered were under 10*l*. though they were laid more in the Declaration. Accordingly a Rule was made to shew Cause. *Vide post.*

Construction upon the Statute of 2 G. 2. which requires that Law Proceedings shall be in English.

Anonymus.

MR. Hollins moved on the Part of the Crown for a Certiorari to remove an Indictment of Felony found at the last Assizes at Durham; and the Certiorari was granted.

How far a Certiorari may be granted to a Justice of Oyer

and Terminer to remove an Indictment of Felony.

Wilkinson and Raper.

MR. Dennison moved to set aside a Verdict, where there was no Defence at the Trial, by Reason of a material Variance between the Plea and the Copy of the Issue. He said likewise, that the Paper-Book of the Copy of the Issue was made up by the Plaintiff's Attorney, and not by the proper Officer, which was another Reason why the Verdict ought to be set aside. The Court declared their Opinion, that the first Cause was not sufficient, by Reason that the Defendant had cured this Defect in the Copy of the Issue by accepting of it; though they did agree, this was otherwise in case of Variances between the Copy of the Issue and the Nisi prius Roll. But the second, they said, might be a Reason; accordingly for that made a Rule to shew Cause.

When a Verdict is obtained without any Defence at the Trial, how far the Court will not set it aside, notwithstanding there is a Variance between the Plea and the Copy of the Issue.

Hayward and Newton.

Serjeant Darnel moved for a new Trial upon account of the Damages being too small in an Action for Words; the Words being spoken of a Wine-Merchant, charging him with selling by false Measure, and the Damages only 20*s*. He did agree, that these Motions are not often made, but sometimes he said, they have been granted; and particularly cited the Case of Woodford and Kneve, where a Writ of Inquiry was set aside for this Reason. The Chief Justice said, that he remembered the Case cited; but, as he took it, the Reason given in that Case was, that there was a Writing appeared, which ascertained what the Damages ought to have been. He observed, that where the Damages are excessive, the Court has sometimes interfer'd; in some Instances they have even increased them

How far the Court will not grant a new Trial, notwithstanding the Smallness of the Damages which were given.

them themselves, and that in violent Batteries, though antiently they used to do it only in Mayhems; however he never knew the Court set aside Clerdies of this kind for the Damages being too small, and has often known these Motions refused; and so the rest of the Court declared. For this Reason Judge Page said, in a Case where he was Counsel, when the Jury gave but 6 d. Damages, and Baron Harsel that tried the Cause, directed the Jury to go out and consider again of their Clerdie, he advised his Client to be nonsuited upon the Jury's coming in the second Time; and after that another Action was brought, and then the Plaintiff recovered 80 l. Accordingly in the present Case the Motion was refused.

Lomax and Honeby.

How far a Person shall be said to be a competent Witness, notwithstanding another Person is produced who swears, that he heard the first Person confess that he was to gain by the Event of the Cause.

IN a Trial at Bar upon a feigned Issue out of Chancery, wherein the Question to be tried was, whether the Plaintiff was ever the lawful Son of one Caleb Lomax, or not; Mr. Wills, as Counsel for the Plaintiff, called one Mrs. Mottram, who was Wife to the Clergyman that married them, in order to be a Witness to the very Ceremony of Marriage, which she herself was present at. Upon this Mr. Reeves on the other Side objected to her being sworn, by Reason that he had an Evidence to produce, one Mrs. Davis, who would swear, that she heard Mrs. Mottram say, that in case the Marriage could be proved the Plaintiff's Mother would take Care that she should never want during her Life. He said, this very Exception was allowed in the Case of Sir George Saunders against Coleby and others, at a Trial at Bar last Easter Term. Judge Lee said, that he very well remembered that Case, and the Doubt there was, whether that Exception was fatal to prevent the Witness being admitted an Evidence, or whether it only went to the Credit of the Witness. Judge Page, he said, was of Opinion, that the Exception only went to the Credit of the Witness, but the rest of the Court inclined to be of a different Opinion. Upon this the Court in that Case desired him to go into the Exchequer to know the Opinion of the Barons. Baron Commyns was not in Court then, but the Chief Baron with the two other Barons agreed, that this Exception ought to prevent the Witness from being examined as an Evidence. He said, he reported this Opinion of the Barons to the Court here, and accordingly the Rule was given, that the Witness should be examined. The Counsel, that called the Witness in that Case, upon this said, that they must tender a Bill of Exceptions. For which Reason, in order to prevent Delay, the Counsel of the other Side agreed, that the Witness should be examined, and he was then examined accordingly. Lord Raymond said, it was very true, that that Case was as has been stated. But yet he observed, that in a latter Case, which came before the House of Lords, relating to the Charitable Corporation, the House of Lords were of a contrary Opinion, and notwithstanding that Exception the Witness there was allowed

allowed an Evidence. He said, that he had considered of this Case by himself since, and he was apprehensive, that it might be a Thing of dangerous Consequence upon such an Exception totally to exclude a Person from being an Evidence. He said, an honest Witness might have a Well-wishing to one Side of a Cause, and in the Zeal of his Heart might say, it would be better for him, if the Cause went on the Side he wished it would. Yet perhaps, if this Person was to be examined upon his Oath, it would be found, that he would not be one Six-pence the better for the Event of it. For which Reason he had altered his Opinion, which he was of before; and now declared, that he did think Mrs. Mottram ought to be examined as an Evidence. Judge Probyn and Judge Lee declared themselves now too satisfied, that she ought to be examined. Mrs. Davis however was first called; but when she came to be examined, she said nothing that was material. Accordingly Mrs. Mottram was examined immediately. The Plaintiff's Counsel went on farther in Evidence, and did seem to give undeniable Proofs of the Marriage, which the Defendant's Counsel was not able to say much against. However what they principally relied upon was, that admitting the Marriage to be proved, and the Plaintiff to be born within the Time of it, yet still he ought not to be considered the lawful Son of Mr. Lomax; because Mr. Lomax was not capable at that Time of getting a Child. The Chief Justice said, that the Defendant might well be allowed to give that Matter in Evidence; and of such Opinion, he observed, the Court was last Easter Term in the Case of Pendill and Pendill. Accordingly such Evidence was given in this Case; but notwithstanding this the Jury gave a Verdict for the Plaintiff.

Jacobs and Crossley.

MR. Reeves now argued the Exception, that had been before taken to this Declaration by Mr. Fazakerly; but the Court soon over-ruled it, for the very same Reasons that were given before. Upon which Mr. Reeves offered another Exception, which was, that the Contract set forth required the Plaintiff to tender to the Defendant 2000 l. of the Common Stock belonging to the York-Buildings Company; but the Averment only is, that the Plaintiff was ready to tender 2000 l. of the Joint Stock of the Company. Mr. Marsh argued on the other Side, and said, that he did agree that the Words were Communis in one Case and Conjunct in the other, and that those Stocks so describ'd might possibly be different. But he observed that the Words in the Averment were, that the Plaintiff was ready to tender prædict' separal' duas mille Libras of the joint Stock, which Word prædict' was inconsistent with the Word conjunct'; for which Reason, he submitted it, that the Word conjunct' should be rejected. Judge Page said, where the Words in a Declaration are, quod Querens obtulit prædict Thomæ for prædict Johanni, the Court often rejects Thomæ; accordingly the whole Court was of the same Opinion; and Judgment was given for the Plaintiff.

Vide ante
156.

Washer

Washer and Smith & Ux'.

How far a Person shall be intitled, or not, to more Costs than Damages, notwithstanding the Damages were under 40 Shillings.

ON Rule to shew Cause, why the Plaintiff should not have more Costs than Damages in an Action of Assault and Battery, by Reason that the Damages were under 40 Shillings, and that there was no Certificate from the Judge of the Battery being sufficiently proved; Mr. Marsh said, that the Defendant had specially justified in this Case, by a Molliter manus imposuit upon the Plaintiff, for his entering into the Defendant's Garden; by which the Defendants have admitted the Assault and Battery; for which Reason he apprehended, that the Certificate of the Judge was unnecessary. Mr. Filmer on the other Side said, that the Statute which he founded his former Motion upon was the 22d of Ch. 2. 9. (136.) and the Construction upon this Act may possibly have been, that there shall be no Occasion for a Certificate, where the Defendant by his Plea expressly admits a Battery, which is the Case, where he pleads de son Assault demesne; though he observed, that he never remembred even that Point determined. But in the present Case he submitted it, that the Defendant had not confessed Battery; but only an Assault; for which Reason, he apprehend, that the Rule ought to be made absolute. Judge Lee inclined to be of that Opinion; and said, that the Words of the Act were, That the Plaintiff shall recover no more Costs than Damages in these Instances, unless where a Judge certifies, that the Battery was sufficiently proved. And he doubted, whether the Battery was confessed in this Case. The Chief Justice and Judge Page inclined to be of a different Opinion; and Judge Page said, that he remembred Lord Holt would allow a smart Beating to be admitted by this Plea. Accordingly the Rule was enlarged. Vide Post.

Dobson and others against Dobson.

When a Writ of Dower unde nihil habet is brought, what are the Damages which the Party will be intitled to recover in such Action.

UPON a Writ of Error on a Judgement in the County Palatine of Lancaster in Dower unde nihil habet, Mr. Robinson took several Exceptions, in order to reverse the Judgment. He observed, that the Statute of Merton, Ch. 1. was the first Statute that gave Damages in this Action, and the Value of the Land is appointed by this Statute to be the Measure of the Damages. But from what Time, and to what Time this Value was to be computed, he said, might be some Question. The Words of the Act are, that it shall be computed from the Day of the Death of the Husband to the Day when the Demandant shall recover her Seisin by the Judgment of the Court. Upon these Words Lord Coke has been of Opinion, in Co. Lit. 32. that the Demandant must not delay bringing her Writ of Dower; and if she does, she shall not take Advantage of her own Laches. But in the present Case, the Action was not brought for above two Years after the Death of her Husband; for which Reason he submitted it, that the Value of the Land ought to have been computed only from the Time of bringing the Action; but yet she has recovered

covered the full Value, equally as if there had been no Neglect in her, even from the Day when her Husband died. Then as for the Time, which the Value of the Land ought to have been computed to, he apprehended it to be clear, that it ought to have been computed no longer than the Time when Judgment went against the Tenant by Default, which was the Award of the Writ of Inquiry. For upon that Judgment a Writ of Error lies, as appears by Sid. 188. and Sal. 252. So that that is the Day, when the Demandant may be properly said to recover her Seisin. But in the present Case she has recovered her Damages even to the Time of executing the Writ of Inquiry, which was above two Years after the Award of it. He conceived likewise that the Entry of the Judgment was wrong. In Judgments by Default it is always taken Notice of, that the Tenant was summoned by the Sheriff, and did not appear; but here it is only said, & sum' &c. which may be understood to be only that a Summons was awarded. In this Record likewise, the Grand Cape is awarded, without giving the Party a Day to appear at the Demand of it, which, he said, was a Discontinuance. In setting out the Default likewise, it is entred, quod ipsi non venerunt, without saying nec aliquis eorum venit. The Continuances likewise ought to have been to a Day certain; but they are ad prox' Session' generally. He took Notice likewise, that the Jury have given 5 Shillings Damages, for what the Demandant suffered occasione detentionis Dotis, besides the Value of the Land, which they found to be 28 Pounds per Annum. For all which Reasons he submitted it, that the Judgment was clearly erroneous. Serjeant Chappel was Counsel of the other Side; but he took a Day to answer the Objections. Vide Post.

Patton and Smith.

IN an Action upon the Case brought by the Plaintiff, as Bailiff of the City and Liberty of Westminster, he declared, that the Dean and Chapter of Westminster, had by Letters Patent under the Great Seal, the Return of all Writs and Processes executed within the City and Liberty aforesaid, and that the said Dean and Chapter had under their common Seal granted the said Privilege to the Plaintiff during his Life, to be enjoyed in as full manner as they themselves had it, virtute cujus he was possessed of the same, till the Defendant executed a Warrant himself within the same Bailiwick, viz. at such a Place, to the Plaintiff's Damage of 100 Pounds. To this Declaration the Defendant demurred, and shewed for Cause specially, that the Plaintiff has alledged, that he was possessed of this Privilege; whereas it appears upon his own shewing, that he was seised of it, by Reason that he had an Estate for Life in it. Serjeant Hawkins argued for the Defendant, and submitted it, that this was a good Cause of Demurrer; for which Purpose he cited Littleton, Sect. 324. He said, he apprehended, that it would be no Answer to this Objection, that bare Possession was sufficient to maintain this Action, and that the setting forth a Title

When an Action is brought by a Bailiff of a Franchise, for an Injury done to his Franchise; what shall be said to be a good Declaration in such Action.

was Surplusage; for if Surplusage is set out at all, the Plaintiff at his Peril must set it out formally; otherwise he conceived the Defendant might Demur. The Serjeant observed farther, that the Declaration was bad in Substance. He took Notice, that there were several Writs, which by Law the Sheriff had a Right to execute in these Bailiwicks, as Writs of Waste, Disseisin, Partition, Non omittas &c. for which Reason the Plaintiff ought to have shewn, what this Warrant was, that the Defendant executed, in order that it might have appeared, that it was not one of those that have been mentioned. But this he has intirely omitted; and has only said in general, that the Defendant executed a Warrant. The last Exception taken by the Serjeant was, that the Word Liberty set forth in the Declaration was of an uncertain Signification. For which Purpose he cited the Case of Wadingford and Hall, adjudged in the Common Pleas, about the End of the last King's Time. The Defendant there pleaded in Abatement, that he lived within the Liberty of such a Place, absq; hoc, that he lived at the Place, where the Plaintiff had siled him of. The Court were of Opinion, that the Word Liberty had an uncertain Signification; for which Reason the Plea was over-ruled, by Reason that the Plaintiff had not given the Defendant a better Writ. Mr. Wynne argued on the other Side, and submitted it, that the Word Possession was oftentimes used promiscuously for Seisin; and to this Purpose cited Co. Lit. 17. 153. and for which Reason he apprehended, that the Forms of Pleading did not require, that those Words should be used so strictly in the different Senses, that have been mentioned. To the second Objection, he said, that the Plaintiff had not the Warrant to produce; and for that Reason it could not be incumbent upon him to set it forth. And to the last he answered, that the Words City and Liberty of Westminster, are constantly used as Words Synonymous, and which signify Places that are co-extensive. Accordingly, the Chief Justice absent, the Court gave Judgment for the Plaintiff, nisi. As the Court was making this Rule for Judgment the Serjeant prayed, that the Defendant might have Liberty to withdraw his Demurrer, and plead the General Issue. Judge Page said, he believed the Court has granted such Motions so late as this is made, in Actions that are brought to try a Right; but never in Actions that are founded upon a Tort, as the present one is.

Evans and Bevis.

In what Court an Attorney's Bill is proper to be taxed.

MR. Kettleby moved to discharge a Rule, made for taxing an Attorney's Bill, and for staying Proceedings in an Action brought upon it, by reason that the Action was for Expences that the Attorney was at in becoming Bail for the Defendant, the Recognizance of Bail being estreated; and farther, because no one Item of this Bill was for Business done in this Court. However, the Court said, that they were possessed of the Cause by the Action's being brought upon the Bill in this Court, and the Plaintiff's being Bail for the Defendant was occasioned by his being Attorney for him; accordingly the Motion was refused.

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The

The King and Jenner.

ON Rule to shew Cause, why an Information should not go against the Defendant for publishing a Libel upon one Mr. Hayward, a Wine-Merchant, in the Daily Advertiser, the Substance of the Advertisement was, This is to give Notice, that Mr. Hayward sells Wine or Brandy by the Gallon, Quart or Pint, and is to be met with at any Hour every Afternoon at one of the Taverns in Smithfield. N. B. Mr. Hayward sells an Excellent Salve made by a Relation of his in Dublin, to cure Women's Breasts with, which may be had at 12 d. a Bottle. The Defendant's Counsel insisted, that this was no Libel. But Mr. Fazakerly submitted it, that it was, by Reason that it tended to lessen a Man in his Trade, and make him ridiculous. However the Court thought that it would be going too far to grant an Information for such a Paper; it was enough to leave the Party to his ordinary Remedy; accordingly the Rule was discharged.

How far the Court will not grant an Information for a Libel, notwithstanding the Matter may possibly be Libellous.

The Bank of England and Morrice.

IN an Action brought against the Defendant, as Administrator to her late Husband, for a considerable Sum of Money due by simple Contract, she pleaded a Bond of 600 l. given by her said Husband to one Mr. Congreve for the good Behaviour of one Josiah Maxwell, as Deputy in an Office to the said Mr. Congreve for six Years, two of which Years remained at the Time of the Plea pleaded, and the Condition of this Bond farther was for Payment of a Sum of Money and some other Particulars; in some of which Particulars she laid a Breach; she pleaded likewise another Bond of 3600 l. Penalty, with Condition for performing certain Articles, as Payment of Seamen's Wages, Commission Money, &c. which were reduced to a certain Sum, as appeared by the Agreement, and then she assigned two Breaches in the Seamen's Wages, and Commission Money not being paid; she farther pleaded a Bond of 53000 l. with Condition for Payment of several distinct Sums at different Installments, and averred, that some of these Payments were not made; she likewise pleaded other Bonds with common Conditions for Payment of Money, some at a Day past at the Time of the Plea pleaded, and others not past at that Time; and then concluded her Plea, that she had not Assets beyond such a Sum not sufficient to satisfy the Debts aforesaid. To this Plea the Plaintiffs put in the usual Replication; and upon that Issue was joined. A Trial was accordingly had before the Chief Justice at Nisi prius, and a Verdict given for the Plaintiff of 28000 l. Mr. Reeves upon this moved a few Days ago for a new Trial; and because the Court thought that there was some Difficulty in the Exceptions, they ordered a Paper to be given of them. The Exceptions taken were principally two; one was, that the Penalties in all these Bonds ought to have been allowed the Defendant in Evidence to cover

How far an Executor shall be allowed to cover Assets by the Plea of Bonds standing out.

ver the Assets with, whereas according to the Chief Justice's Opinion nothing ought to have been allowed, but what was bona fide due according to the Condition; and so he directed the Jury to find. The other was, that whereas there were Ships out at Sea belonging to the Intestate, and Man'd by his Servants, but were not returned home till after the Plea pleaded; yet the Chief Justice was of Opinion at the Trial, that these were present Assets for the Defendant to be charged with; and so he directed the Jury to find likewise. Serjeant Eyres argued on the other Side, and said, that he did agree, that the Penalty of the 6000 l. Bond the Defendant ought to be allowed to cover the Assets with; because a Breach in this Bond was actually made in the Life of the Intestate, so that the Bond might be said to be in Strianness forfeited; and it was impossible to ascertain what in Conscience and Equity would be due upon it, by Reason that two of the Years mentioned in the Bond were not past at the Time of the Plea pleaded. On the other Side, he said, he apprehended, that the Counsel for the Defendant must admit, that the Penalties of those Bonds, which were made for Payment of Sums certain, ought not to cover the Assets; because the Sums, which were in Conscience and Equity due, might be ascertained with the greatest Ease imaginable, by computing only Principal and Interest. He said, that Experience shews, that this is constantly done upon Trials, and he conceived, that the Construction upon the Statute for the Amendment of the Law, Sect. 13. well warranted it. The Debate then will principally arise upon the Bond of 3600 l. whether that Penalty ought to be allowed or not. And as to that he submitted it, that it ought not; for though many of the Conditions of this Bond are for doing collateral Acts, yet those Conditions, which the Breach is assigned in, are reduced to a Sum certain; for the Seamen's Wages and Commission Money are settled by the Articles at a certain Rate. However if the Penalty of this Bond should be allowed, yet the Fact was, that the Defendant was still overcharged. But he submitted it farther, that the Defendants Counsel were totally irregular in taking Part of these Exceptions now; because at the Trial they directly waived the Benefit of the 53000 l. Bond, and of the other Bonds for Payment of Sums certain. Besides, he said, that no Exception ought to be taken in moving for a new Trial, unless it shews that the Judge misdirected the Jury. Then as to some of those Bonds he observed, that the Day was not come for the Payment of them; for which Reason as to them there was no Colour that the Defendant should take Advantage of the Penalties; he said, that they should be allowed. The Chief Justice said, that as to the Bonds of 6000 l. and 3600 l. Penalties he was indeed of Opinion at the Trial, that nothing ought to be allowed upon them, but what was bona fide and in Conscience due, and as to the other Bonds the Plaintiff's Counsel themselves did not insist upon the Penalties. However upon considering more fully of the Matter, he was of Opinion, that the Defendant had a Right to have every one of these Penalties allowed. For the Penalty is the Debt, which a Court of Law must consider to be due; and this Court cannot consider Things as

this Nature in that Light, which Courts of Equity do. And as to the Statute for the Amendment of the Law, he thought that made no Difference in this Case; because the Manner of taking Advantage of that Statute has not, nor could have been taken Advantage of in this Case. He did agree, that where a Bond-Creditor is contented to take the Principal and Interest, and the Executor will not pay it, but keeps the Bond on Foot to cover the Assets, if such Bond is pleaded in Bar, that the Plaintiff may well reply, that the Bond was kept on Foot per fraudem; and then nothing shall be allowed the Executor upon Evidence, but what was in Conscience due upon it. And so is the express Authority of 3 Lev. 368. But otherwise he thought the Executor had an Advantage of covering the Assets with the Penalty, which in a Court of Law he was well intitled to. Then as to the Plaintiff's Counsel being too late to take this Exception now with Relation to the Penalties of those Bonds they admitted, he said, it appeared to the Court upon the Face of the Record, that they ought not to have admitted it; upon the Record this Court is to judge; and therefore will not take Advantage of the Admission of Counsel in Detriment of such Right. But if the Matter had not appeared upon the Record, he agreed it would have been otherwise. As to those Bonds, where the Day was not come for the Payment of them, he said as to them likewise, he thought they ought to be allowed. He did agree, that if such Bond had been for the Performance of a collateral Condition, and the Day not come for the Performing it at the Time of Plea pleaded, the Bond would not be allowed the Executor to cover the Assets with; and so is Harrison's Case, Coke's Rep. But where it is for the Payment of a Sum certain, he took the Law to be otherwise. He said likewise as to the second Exception about the Ship's being Assets he had great Doubts with himself, whether that Opinion was right. The rest of the Court declared their Opinions with the Chief Justice, in Relation to the first Exception taken by the Plaintiff's Counsel; but as to the second they thought it unnecessary to deliver an Opinion. Accordingly the whole Court were making the Rule absolute for a new Trial. However upon some Doubts arising, whether there should be a Repleader awarded, as there was in the Case before cited out of Leo. or whether the Action should be begun de novo, the Court thought that Matter might require a little farther Consideration; accordingly only enlarged the Rule. Vide post.

Morley and Morris.

A Special Demurrer was made to a Declaration for want of Pledges. But in the Copy of the Declaration delivered there was the Word Pleg', &c. and upon the Roll the Pledges Doe and Roe were entered. Upon which a Motion was made to set this Demurrer aside; and accordingly a Rule was made to shew Cause. The Chief Justice absent.

How far the Court will set aside a Demurrer by reason of its being frivolous.

Anonymus.

How far the Court will set aside a Plea of Misnomer, by reason of its being frivolous.

A Plea in Abatement was put in, that the Defendant's Name was Martin, absque hoc that it was Marten. On Motion to set this Plea aside, the Court said, that this was so clearly a sham Plea, by reason that the Names were exactly of the same Sound; accordingly they made a Rule to shew Cause, and ordered the Attorney to attend. Chief Justice absent.

Anonymus.

How far the Court will give Liberty to enter a Suggestion on the Roll, in order to warrant the Award of a Venire.

Serjeant Darnel moved for Liberty to enter a Suggestion upon the Roll in an Action qui tam, where a third Part of the Penalty was given to the City of London, that the Sheriffs were Freeman of the City, in order to warrant the Venire's being directed to the Coroner: and a Rule was made to shew Cause. Chief Justice absent. Vide post.

Beach and Johnson.

How far the Court will quash a Writ of Error.

MR. Kettleby had moved a few Days ago, that a Writ of Error might be quashed for a Variance between the Writ of Error and the Transcript of the Record; the Defendant below being named as Administratrix to her Husband in the Transcript of the Record; but that Addition being left out in the Writ of Error, the Court then ordered Notice to be given of the Motion; because they thought the Writ of Error amendable. He now made this Motion over again, having given Notice, but the other Side did not attend; and he said, he apprehended, he had a Right to Costs upon the Statute for the Amendment of the Law. Judge Page said, he thought that the Writ of Error was pretty clearly amendable; but if the other Side would not move to have it amended, he did not see, that the Court was bound to do it ex Officio. Accordingly the Court made a Rule to shew Cause, why it should not be quashed with Costs. Chief Justice absent. Vide post.

Jenner and Paddington.

When Money is brought into Court, how far the Defendant shall not be allowed to have any Part of it back again.

MR. Wirley moved, that 20 l. which had been paid into Court might be restored to the Defendant, by Reason, that the Plaintiff died before Verdict; and several Applications had been made to the Executors to take the Money, but they had not done it. Judge Page said, that in the Common Pleas he believed such Motion might be regular, because there the bringing it into Court is not direct Payment; for if the Plaintiff does not prove upon the Trial, that so much is due to him, as is brought in, the Defendant is intitled to the Remainder back again. But in this Court it is direct Payment, and though so much Money

Money as is brought into Court should not be proved to be due, yet the Plaintiff is intitled to the whole. Accordingly the Motion was refused, Chief Justice absent.

Mansel and Mansel.

Canc. **O**N an Appeal to Lord Chancellor from a Decree made by the Master of the Rolls, there was thought to be some Difficulty, and upon that Lord Chancellor thought it proper to have Lord Raymond's and Lord Chief Baron's Assistance. The Case was, that Sir Edward Vaughan was seized of the Lands in Question in Fee-simple, and devised the same to his Sister Dorothy for Life, the Remainder in Trust to preserve contingent Remainders; the Remainder to her first and every other Son in Tail Male. Sir Edward Vaughan likewise charged these Lands with the Payment of Debts and Legacies. After his Death, Dorothy married Sir Edward Mansel, and during the Coverture, before Issue had, Dorothy joined with the Trustees for preserving the contingent Remainders, in making a Deed of Feoffment to Sir Edward Mansel, the Intent of which Deed was declared by the Words of it to be, for raising and levying Money to pay the Debts and Legacies charged upon this Estate by the Will of Sir Edward Vaughan, by demising, letting, selling or mortgaging the Premises, or any Part thereof for that Purpose. In this Deed of Feoffment there was a Covenant to levy a Fine, and make such farther Assurance as should be adviseable for settling the same Uses; and soon after a Fine, with a Lease and Release, was executed by Dorothy and the Trustees above-mentioned, to Sir Edward Mansel accordingly. Sir Edward Mansel makes his Will of these Lands, and devises them to the Plaintiff his eldest Son, begotten on the Body of Dorothy, for Life, the Remainder to his first and other Sons in Tail Male, with like Remainders to his other Children, the Remainder to Rawley Mansel, the Defendant, with divers Remainders over. The Plaintiff brought his Bill before the Master of the Rolls, praying that he might have an Estate-Tail decreed to him out of these Lands, in Pursuance of the Will of Sir Edward Vaughan, and the Master of the Rolls decreed for him accordingly. Mr. Rider now argued for him before Lord Chancellor. He said, that he conceived the Intent of the Conveyances executed by Lady Mansel and the Trustees, was by no Means to prejudice the contingent Remainders; but only to vest the Estate in Sir Edward, for this particular Purpose, that it might be the sooner cleared of the Debts and Legacies charged upon it. The Words of the Feoffment, he said, clearly shewed this; and if this was so, there was a resulting Trust for the Benefit of the contingent Remainders; but suppose it should be admitted, that the Intent of the Parties was to destroy this Contingency, yet he apprehended, that as the Case was, a Court of Equity would give Relief, and decree the Parties to be in the same State, as they would have been, if these Conveyances had not been made. He did agree, that the Plaintiff was a Devisee, and therefore to

How far it shall not be in the Power of Trustees to destroy contingent Remainders.

to be considered as a Voluntier only, in a Court of Equity. He did agree too, that in the Case of a Voluntier, the Court will not relieve a defective Conveyance. But the present Relief is prayed by Reason of Trustees breaking their Trust, and the Relief is prayed against Persons, that are meer Voluntiers, and claim under one that had Notice. Had there been no Trustees in this Case to have preserved the contingent Remainders, or had the Defendants been Purchasers without Notice, he would readily have agreed, that this Court would not have given the Relief that is now desired. But as the present Case is circumstanced, he conceived it fell within the common Cases of Relief that is every Day given. It is a Rule, he observed, that the Court will never allow Trustees to purchase an Estate which they are intrusted with; if Trustees do make such Purchase, the Court will set it aside. In the Case of Rumford Market there was a Term for Pears in the Market, which was in Trust for the Benefit of an Infant, and was expiring. Application was made by those Trustees to have another Lease made them of the Market, for the Benefit of the Infant, to commence upon the End of the first Lease. The Lord of the Market refused to make them such Lease in the Right of the Infant, but offered to make them such Lease in their own Right, if they would accept of it. The Trustees accepted the Offer, and had a future Term in the Market made to them accordingly. Upon a Bill brought by the Infant, the Court decreed this future Term to be assigned for his Benefit. And that Case, he said, was determined in the Time of the present Chancellor. For which Reason, he said, he apprehended, that the single Declaration of the Lord Harcourt to the contrary, taken Notice of in the Abridgment of Equity Cases 385. would not prevail. The Court inclined to be of Opinion, that for this Breach of Trust the Decree of the Master of the Rolls ought to be affirmed, however made no Decree at present. But in the Vacation after this Term, the Chief Justice, and Chief Baron met at the Chancellor's House, and the whole Court affirmed the former Decree unanimously.

Evans and Hamerton.

How far a
Certiorari
will lie, in
Case of a
foreign At-
tachment.

MR. Kettleby moved, that a Certiorari directed to the Sheriff's Court in the City of London might be quashed, by Reason that there had been a foreign Attachment in the Court below, and Proceedings in it so far as Issue joined upon Nil debet, between the Plaintiff and the Garnishee, which Issue, he conceived, this Court could not try. But Judge Page said, that this Process of Foreign Attachment, is only in Default of the Defendant's appearing below, and to the Intent of bringing him into Court; so that if he appears at any Time within a Year and a Day before Judgment given against the Garnishee, the Proceedings against the Garnishee are staid of course. Now he observed, that before the Certiorari is of any Effect in the Court above, the Defendant below must give Bail above, which is an Appearance to the Action here. So that the Plaintiff rather

ther receives a Benefit than a Prejudice by this Certiorari. For which Reason the Court made no Rule upon this Motion. Chief Justice absent.

Crompton and Den.

IN an Action brought by the Indorsee of a Bill of Exchange against the Drawer, the Defendant pleaded his Discharge under the late Insolvent Debtors Act; the Plaintiff replied, that he resided within ten Miles of the Place where the Defendant was in Prison, and that he had no Notice given him, by the Defendant within thirty Days of his Discharge, of his Intentions of being discharged; the Defendant rejoined, that he did not know, that this Bill of Exchange was indorsed to the Plaintiff; upon this there was a special Demurrer, and the Cause shewn was, that the Defendant's Excuse in his Rejoinder was set forth in too general a Manner, and likewise that the Rejoinder was a Departure from the Bar. For this Purpose Mr. Spelman cited Show. 334. Salk. 221. Judge Lee said, that for this Part he had some Doubts, whether the Defendant's Rejoinder was not ill in Substance, by Reason that he took it the Defendant was obliged to take Notice who was his Creditor. The Words of the Act, which the Defendant has relied upon for his Discharge, are, That every such Prisoner shall give thirty Days Notice to all his Creditors living within ten Miles of him. The Plaintiff, he said, certainly could not be obliged to give Notice of this Indorsement to the Defendant, by Reason that he could not know, that the Defendant intended to get himself discharged under the Act. For which Reason he doubted, whether the Defendant must not be obliged to take Notice of it. He said, it might be objected possibly, that since the Defendant has got his Discharge at the Sessions, every Thing relating to it shall be taken to be done regularly, and no Averments allowed against any Defects in it. But as to that, he observed, that this Point was expressly over-ruled in the Time of Lord Macclesfield, when he was Chief Justice, in the Case of a Person that was discharged the 7th of December 1711, upon the late Insolvent Debtors Act that was passed at that Time. And Lord Macclesfield declared that all the Judges of England had been consulted upon that Point, and this was their Opinion. The whole Court were clearly of Opinion, that the Rejoinder was no Departure from the Bar; but as to the other Points, they thought this a Matter that deserved to be farther considered of. *Vide Post.*

Construction upon the Statute of 2 G. 2. which is called the Insolvent Debtors Act.

The Bishop of Landaff and The King.

MR. Fazakerly now argued for the Plaintiffs in Error, and stated the Matter relating to the Archbishop's Dispensation more fully than it was before. In this Dispensation, he said, the Petition of Dr. Tyler, then Bishop of Landaff, is recited. And in that Petition it is recited, that the Revenues belonging to that Bishoprick are not sufficient to support the Dignity of a

Vide ante 71.

Bishop; whereupon it is desired, that with this Bishoprick he may have Liberty to hold the Rectory of St. Andrews in Glamorganshire, which is the Rectory in Question, together with the Rectory of Bedwin in Somersetshire, with the Deanary, and one of the Prebends of Hereford. After this Recital of the Petition the Archbishop, post veram & justam Examinationem of the Matter, grants him Liberty to hold these Benefices in Commendam, so long as he continues Bishop of this Diocese, provided that he has the Queen's Confirmation, that he should do so, by such a Day. Mr. Fazakerly said, that the Statute of H. 8. made it requisite, that the Queen should confirm these Letters of Dispensation, and the Queen accordingly did confirm them within the Time mentioned. Upon this State of the Case, he said, he did agree, that the Archbishop was Judge of what was sufficient to be added to support the Dignity of a Bishop, and that that Point was not traversable. But yet he observed, that the Archbishop ought to have set forth in his Dispensation, that what the Bishop was to hold with his Bishoprick, he did adjudge to be no more than was sufficient; which, he submitted it, was not done in the present Case. The Petition indeed of the Bishop is recited, setting forth, that the Revenue of the Bishoprick was not sufficient to maintain the Dignity of a Bishop; but it does not appear but this Bishoprick, together with the Deanary and Prebendary, and the Rectory of Bedwin, might have been amply sufficient, without adding the present Rectory to them. He said likewise, that he apprehended that the Archbishop ought to have averred in express Terms, that the Bishoprick itself was not sufficient. He observed, that it is well known, that such Adjudication is necessary in Orders of Justices of Peace; and he did not know any Difference in this Respect, between that Case and this. He then spoke with Relation to the Commendam itself, set forth in the Declaration. This Commendam, he said, must either be accipere or retinere. If it is taken to be a Commendam retinere, it cannot possibly amount to a Presentation; because that is but a Continuation of the former Right of the Parson; and so is Hob. 143. If it is taken to be a Commendam accipere, it cannot be good; because that ought to be during the Bishop's Life; and so is the same Book 149. But this is only during the Time that Dr. Tyler shall continue Bishop of this Diocese. Serjeant Chappel argued on the other Side, and said, that as to the Dispensation, he apprehended it to be very good. The Archbishop's consenting, that the Bishop should enjoy all these Benefices with his Bishoprick is an Evidence, that he thought all of them but sufficient to support his Dignity. Especially he observed, that this must be good, since the Archbishop has declared that he granted this Dispensation post veram & justam Examinationem of the Matter in the Petition. Then as to the Commendam, he conceived it to be accipere only; and Commendams accipere granted in the Manner that this is, and even for a Term of Years only, are held good in Vaughan 22, against the Authority of Hob. However, he said, be these Points so or not, he should submit it in the first place, that a Presentation is not necessary to be laid in a Quare Impedit brought by the King; and in the second place, admitting it

to be necessary, so as that the Defendants might have demurred for want of it, yet the *Ardia* has cured the Defect. The Court declared themselves clear of Opinion against The King in all Points, but this Matter about the *Ardia*; agreeing that a Presentation, or what amounted to as much, was necessary to be laid in The King's Case, as well as private Persons; that a Commendam accipere would amount to a Presentation, but that the present one was a Commendam retinere, and that that could not amount to a Presentation; allowing at the same Time, that Commendams accipere even for a Term of Years, if the Bishop lived so long, were good, and that the present Dispensation was good likewise. But as to the *Ardia*, they believed that the Rule was not true, which is sometimes mentioned, that nothing shall be helped by a *Ardia*, but what must have been proved at the Trial; and doubted, whether the present Defect was not helped. However, this Matter stood over. Vide Post.

The King and Stephenson.

THE Defendant having been brought up by Habeas Corpus, When a Person is committed on the Statute of 8 G. 1. which was made to prevent the running of Goods, how far the Court will bail the Defendant, or not. Mr. Marsh moved that the Return to it might be read, which was done accordingly. And now upon the Commitment the Fact was stated specially, that twelve or thirteen Persons in Number, one of which the Defendant was, in the Month of September 1730, were together within a Mile of Faversham in Kent, upon the Sea-Shore, digging up 1400 Pounds of Tea, that had been run and buried in the Ground; that thereupon Captain Clements, a Custom-house Officer, came up to them in Order to make a Seizure, but that the Persons above-mentioned having Arms about them, ordered him to dismount, which he did accordingly, and then they took the Bible off his horse, and rid off with the Tea; and one of them was going to shoot him, but the others prevented him. Upon this State of the Case, Mr. Marsh said, that he apprehended, this Commitment could not be founded upon 8 G. 1. 18. Sect. 6. because to make this an Offence within that Statute, the Persons must have been passing with the Tea, which they were not. For which Reason he conceived, that it could only be founded upon 6 Geo. 1. 21. Sect. 34. and if so, it was only a Misdemeanor; accordingly he hoped, that the Defendant should be bailed. He said, that he was informed, that upon Informations on this Statute, the Proceedings are by a common Subpoena, and Mr. Masterman had acquainted him of two Instances where Defendants had been bailed upon this Act, one of which was upon an Information filed against one Buckler, the other against one Joyce, both in Lord Chief Justice Pratt's Time. He said, he conceived that this Application was more allowable in the present Case, by Reason that it is above two Years since the Offence was committed. The Attorney General on the other Side answered, and said, that he did agree, that in Informations upon the Statute of 6 Geo. the Process has been by a common Subpoena and Defendants have been bailed. But the present Commitment was well warranted by the Statute of 8 Geo. that has been mentioned

tioned. He said, the Facts stated in the Commitment amounted to an actual passing with the Tea, and upon an Indictment would be full Evidence of it. However it was not necessary, that the Persons should be passing; for if by Violence they obstruct a Custom-house Officer in the Execution of his Office, it is Felony by that Act of Parliament; for the Words are in the Disjunctive. Then as to the Distance of the Time he conceived it not material in this Case; because though the Fact was committed so long ago; yet Intelligence was given of it but very lately. The Court was of Opinion, that this Offence was within the 8th of Geo. 1. for each of the Reasons given by the Attorney General, and they thought he had given a full Answer to the last Matter likewise. The Chief Justice said too, that if there had been Doubts upon the Form of this Commitment, whether as it was penned, it was strictly within the Act, or not, he should have thought it well amendable; accordingly the Defendant was remanded.

Spring and Seek.

Construction upon the Statute of G. 2. which allows a Defendant to be served with a Copy of a Writ.

THIS was a Proceeding upon the late Act of Parliament, which allows the Plaintiff to enter an Appearance for the Defendant, and to serve him with Notice of the Declaration being in the Office. The Plaintiff's Attorney had given this Notice on the 4th of this Month, and for want of the Defendant's putting in a Plea, signed his Judgment on the 8th. Upon which a Motion was made, that this Judgment might be referred to the Master. The Chief Justice at first thought that the Judgment was regular; by Reason that he took it, that the Day when Notice was given was to be taken inclusively into the Computation of the four Days for pleading; however, upon Mr. Monday's saying, that the Practice upon this Act of Parliament had been otherwise, the Court granted the Motion.

The King and The Inhabitants of Woodbery.

Concerning what Things the Sessions has no Authority to make Orders upon Overseers.

AN Order was made by the Sessions upon the Overseers of this Parish to pay a Surgeon's Bill, and some Law-charges. Upon which Mr. Filmer moved to quash it; by Reason, that the Sessions had no Power to make such Order. The like Order, he said, was quashed in the Case of The King and The Inhabitants of Holditch. Accordingly a Rule was made to shew Cause.

The King *and* Lofeild.

A Rule was made absolute for granting an Information against the Defendant, last Easter Term; but no Information was filed against him till this Term. Upon which Mr. Strange moved for an Imparllance till next Term; and the Court granted it.

Vide ante.

152.

How far the Court will grant an Information against a Person for exercising an Office, by Reason that those who elected him had no Authority to do it.

Anonymus.

MR. Starkey moved for an Information in the Nature of a Quo Warranto against one for exercising the Office of Capital Burgess in the Borough of New Radnor. He did agree, that this Person had the Majority of Votes upon this Election; but the Persons that gave him these Votes, had no Authority for Voting, by reason that they were not duly sworn in Capital Burgesses. For their Charter requires, that they should be sworn before the Mayor and two Aldermen; but there was an Information in the Nature of a Quo Warranto pending against the Mayor at that Time; and Judgment of Ouster was afterwards pronounced against him. Accordingly a Rule was made to shew Cause.

How far the Court will grant an Information against a Person for exercising an Office, by Reason that those who elected him had no Authority to do it.

The Countess Dowager of Winchelsea *and* Higden

IN Debt upon Bond the Defendant craved Oyer, and the Condition appeared to be for performing Covenants in a certain Indenture, Part of which were in the Affirmative, Part in the Negative. As to the Affirmative Covenants he pleads quod performavit; as to the Negative non infregit. The Plaintiff replies, that one of the Covenants was for Payment of Rent at the usual Quarterly Feasts, and that 10 l. 10 s. was arrears of it and unpaid at the Feast of St. Michael 1730. The Defendant rejoins, that on the said Day he tendered the Money to the Plaintiff, and she refused it. To this there was a Demurrer, and a Joinder in Demurrer; and the Cause specially shewn was, that this Rejoinder was a Departure from the Plea. Mr. Bootle, Jun. argued on the Part of the Plaintiff, and cited Cro. Car. 76. 2 Saun. 82. Mr. Taylor on the other Side argued, and said he did agree, that if the Defendant had endeavoured to excuse himself from the Performance of this Covenant by the Act of God or the like, this would have been a Departure. But he submitted it, that upon the Matter this was a Performance of the Covenant. In the Case of Owen and Reynolds this Term in the Common Pleas; the Action was Debt on Bond with Condition to save the Plaintiff harmless from the Connage of Coals, the Defendant pleaded Non damnificatus; the Plaintiff replied a Distress taken for it; the Defendant rejoined, that none was due. Upon this there was a Demurrer; but that Court held it to be no Departure. The Chief Justice

How far a Rejoinder shall be said to be a Departure from the Plea.

agreed that Case to be Law; and said, that the Rejoinder there fortified the Bar; but in the present Case there is a Departure; for the Matter in the Rejoinder goes only by Way of Excuse; Tender and Refusal being not Payment, but only discharging the Party from Damages. For this Purpose Judge Page put the Case of solvit ad diem pleaded to Debt on Bond. Upon Evidence, Tender and Refusal will not maintain the Issue; which the Chief Justice agreed. Accordingly the Court gave Judgment for the Plaintiff.

Ball and Knight.

Vide ante
164.

THIS Matter coming now on again, Mr. Wright argued for the Plaintiff; and said, he did submit it, that no Custom altering the established Principles of the Law was ever held to be good. The established Principle of Law in this Case he apprehended to be, that every Trial shall be had by twelve Men of the Neighbourhood that there can be no Exception against. But in the present Case the Custom is, that where there is a Defect of a sufficient Number of Jurors, the Defect is to be supplied by any of the By-Standers, of whatever Part of the Kingdom they live, and whatever Exceptions there may be against them. He said, this was by no Means agreeable to the Statute of 35 H. 8. for there the Tales are required to be of the Body of the County; and each Party is allowed his just Challenges. Not that he should have thought it a convincing Argument, if the Custom had been as the Statute is, that therefore the Custom would have been good. For another Statute of H. 8. allows Trials to be by six Jurors in Wales; yet such Custom has been always held to be void. He argued largely upon the general Learning of what Customs are allowed by Law, what not; but the Case which he principally relied upon, was that cited upon the former Argument out of Roll's Abr. where this very Custom is expressly held to be bad. Mr. Prime argued on the other Side, and said, that he had seen the Record of that Case so much relied upon; and there were many Exceptions to it, which the Judgment might have been reversed upon, besides that which Roll takes Notice of; particularly, he said, the Venire is not awarded by Vicineto, neither is the Entry quod Juratores posuerunt se in Juratam, but in Curiam. He observed likewise that in the Book called Trials per Pais, p. 69. the Author is of Opinion, that a Custom to award a Tales is good. The Chief Justice said, that its being averred in the present Record, that the Names of the Tales were added secundum formam Statuti, he did not think material in the present Case; because the Custom does not appear to be according to the Statute. And as to the Case cited out of Roll, he said, it was taken at the Bar by Roll himself; and therefore he thought it of great Authority. Judge Probyn said, that the general Principle of the Law was not only that the Trial should be by Twelve, but that they should be Pares likewise; which as the present Custom is set out, may not always be the Case. Judge Lee said, as the present Record is, there was

was no Occasion to give an Opinion, whether the Custom would have been good, if it had been according to the Statute. However even in that Case he should have thought it not good, upon the Authority of the Case cited out of Roll's Abr. But in the present it was much worse. Accordingly the Judgment was reversed.

Speak qui tam *and* Bourn.

MR. Filmer now argued on the Part of the Plaintiff, and submitted it in the first place, that the Office of Clerk of a Parish was merely Temporal. He observed, that there were several Authorities cited upon the former Arguments to prove it to be so; and he beg'd Leave to mention a few more out of Godb. 163. Hil. 22 Jac. 1. in the old Edition of Bendloe 141. 1 Leo. 94. and Fitzherbert's Abr. Cit. Annuity 40. which Case is likewise taken Notice of in Hughes's Parson's Law 279. If this Office then in the Nature of it was considered as Temporal, he conceived, that there would be no Difference, whether he was nominated by the Parson, or whether elected by the Parish. If this Point was with the Plaintiff, he apprehended, that the clear Consequence would be, that he might make a Deputy, and for this Purpose cited Moor 885. 3 Bul. 77. 9 Rep. 48. However supposing for Argument sake it was admitted, that the Office was Spiritual, yet he said, no Cases had been cited on the other Side to shew that it was necessary for a Clerk of a Parish to take a Licence; and if that Point was with the Plaintiff, the Prohibition must necessarily stand; for the whole Tenor and Purport of the Libel is upon that Matter singly. Mr. Fazakerly argued on the other Side, and said, that all the Citations that have been made, to shew that this was a Temporal Office, were only Obiter Sayings of Judges, pretty much about the Time of Jac. 1. except the Case in Fitzherbert's Abr. but he apprehended, that that Case went a great deal too far; for it is there held, that a Parish-Clerk is an Officer at Will only. He conceived, that general Experience shews this to be otherwise, and its having been held, that such Office gains a Person a Settlement proves it to be otherwise. He observed farther, that the Case of Mallard and Smith, Hil. 8 Ann. was a much later Case than any that has been cited, and was an Authority directly on the other Side. A Clerk of a Parish sued there in the Ecclesiastical Court for a Pension; on Motion for a Prohibition, the Court held, that the Suit would well lie; for that he was a Spiritual Officer. And in the Case of Townsend and Thorp, cited on the former Argument, the Court was expressly of Opinion, that he was to be considered as a Spiritual Officer, when he came in by the Nomination of the Parson, which was enough for the present Purpose. But, admitting that he was to be considered as a Temporal Officer; yet he said, this Office was an Office of Skill; and therefore as there were no Words in his Nomination giving him a Power to make a Deputy, he could not do it. He observed farther, that it could not be denied, but the

Vide ante 31.

the Matters which a Clerk exercises himself in, were Matters relating to the Church; for which Reason he submitted it, that it could not be denied, but the Ecclesiastical Courts had a general Jurisdiction over him. A Suit therefore against him for Matters relating to the Execution of his Office could not be laid, but to be rightly instituted; and if there are any Matters thrown into the Libel, which are of themselves of a Temporal Nature, yet if they relate to him in the Execution of his Office, he apprehended this Court would not grant a Prohibition. And for this Purpose cited 1 Leo. 138. 1 Sid. 217. 1 Cro. 65. 1 Ven. 64. The Chief Justice declared his Opinion, that a Clerk might make a Deputy, and thought that whether the Clerk came into his Office by the Nomination of the Parson, or by the Election of the Parish, the Office must be considered the same in one Case as in the other; and so Judge Page was of Opinion likewise. Judge Lee said, that he thought there was no Occasion to determine, whether this Office was Temporal or not; but the Common Law Books were certainly very strong on that Side of the Question; and he had a Note from a Gentleman at the Bar in Lord Holt's Time, where a Suit was instituted in the Ecclesiastical Courts by a Clerk for his Salary; and on Motion the Court granted a Prohibition. However what the Court in general declared their Opinion upon in this Case was, that the plain Tenor of the Libel against the Plaintiff was for his not taking a Licence, and they could not see any Law that there was to oblige him to do it; for which Reason they made a Rule that the Prohibition should stand.

Hore and Yates.

Vide ante
157.

IN an Action upon several Promises, the Defendant pleaded Non Assumpsit infra sex Annos; the Plaintiff replied, that he sued out a Bill of Middlesex, Hil. 13 Geo. 1. which Bill of Middlesex was continued down to the Time of the Declaration, and that before the suing out this Bill the six Years were not incurred; the Defendant rejoined, that though by the Course of the Court a Bill of Middlesex sued out in the Vacation is supposed to issue of the preceding Term, yet in Truth the Bill of Middlesex in Question was sued out after the End of Hil. Term before mentioned, viz. on the 30th of March, and that before that Time the six Years were incurred. To this Rejoinder there was a Demurrer. And now Serjeant Chapple argued for the Plaintiff, and said, he did agree, that a Bill of Middlesex had no Cesse; but yet he submitted it, that there was as strong an Estoppel to prevent the Party's saying that the Writ was not sued out in Term, as if it actually bore Cesse of a Day in Term-Time. He said, there were various Cases to prove, that if this had been a Latitat or an Original, which always bears Cesse in Term, there would have been no Averment admitted, that the Writ was in Fact sued out after Term. For which Purpose he cited, Lut. 332. 1 Sid. 53 and 60. Stiles 156. Carthew 232. 2 Cro. 264. Sid. 271.

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1 Roll's

¹ Roll's Abr. 893. ¹ Mod. 188. Cro. Eliz. 181. By many of which Books he said, it appeared, that the Teste of the Writ is the Commencement of the Suit, and that there was no Difference in this respect between Suits by Bill of Middlesex and Suits by Original. If this then was so, that the Party shall be estopped from saying, that Writs that bear an actual Teste, were sued out on a different Day from that which they bear Teste of; he submitted it, there was equal Reason to say, that in Writs, that bear no actual Teste, but which the Law gives, the Teste to the Party shall equally be estopped likewise. Mr. Reeves argued on the other Side, and said, he did agree that the general Rule of Law was, that the Party is estopped from saying, that a Writ was sued out on any Day, but on that which the Writ bears Teste of. However even to that Rule, he submitted it, that there were some Exceptions; as where the Party must be manifestly prejudiced by such a Fiction; and for this Purpose cited 2 Keb. 173, 198. 3 Keb. 213. But in the present Case he said, there was no Teste, neither in Fact, nor Judgment of Law; for which Reason he apprehended, that clearly there could be no Estoppel. Judge Lee said, that there were Exceptions even to that Rule of Estoppel, where the Writ bears Teste in Term; and for that Purpose cited Raym. 161. The Rule however in general the Court said certainly was, that of Writs bearing Teste in Term, the Law considers them to be sued out of the Day they bear Teste of. But the present Case they inclined to think distinguishable from that, by Reason that there is no Teste. However the Matter was ordered to stand over. Vide post.

Patton and Smith.

Serjeant Hawkins now came and submitted it, that in this Action it was necessary for the Plaintiff to lay a Title to the Bailiwick, by reason that the Sheriff has the general Authority over the County given him by the Law; for which Purpose he cited the Case of St. John and Moody, out of Lev. that of Star and Rookesby out of Salk. Rep. 7, 24. Lut. 114. Dyer 70. If this was so he said, he conceived, that the Law would require it to be set out according to the first Forms of pleading, and therefore that the *Virtute cujus possessionatus* was not right; but the Words ought to have been *Virtute cujus fuit seiscus*. The Chief Justice and Judge Page at first inclined to think, that as this Action was brought against a Wrong-doer, a Title was not necessary to be set out. However afterwards the Court did agree that it was. But yet the Court said, that the Words *seiscus* & *possessionatus* they would take to be synonymous; and if so, the Plaintiff had set forth a good Title clearly. Accordingly the Rule was made absolute for the Plaintiff's having his Judgment. Vide ante. 181.

The King *and* The Inhabitants of Utoxeter.Vide ante
179.

THE Chief Justice now delivered the Resolution of the Court upon this Matter. He said, they were all of Opinion, that one Part of the Order of Sessions was bad, which appointed Overseers over the three Mills; because it did not appear, whether they intended to appoint them over the three Mills jointly, or over each of them separately. But the rest of the Order they thought was good. Accordingly the first Part of it was quashed, and the rest confirmed.

Anonymus.

How far the
Court will
not grant an
Information
against a
Person for
executing a
Blank War-
rant.How far the
Court will
not grant an
Information
against ano-
ther, by rea-
son of the
Smallness of
the Offence.

ON Rule to shew Cause, why an Information should not go against a Man, the chief Complaint, that remained unanswered, was, that he executed a Blank Warrant; and Mr. Fazakerly said, this was ruled to be bad very lately at the Assizes at Carlisle. But Judge Page said, that upon an Indictment of Murder a Justification was made by a Blank Warrant before Mr. Justice Powel, and he allowed it to be good. He believed too that in these large Counties, as this was in Yorkshire, the Practice of making out Blank Warrants is very frequent. However the Court in general said, that there was no Occasion to determine the Legality of this Matter now. The present Motion was for an Information; and they did not think this a sufficient Reason for granting it. There is another Remedy open for the Party, if he thinks proper to try, whether these Warrants are legal or not. Accordingly the Rule was discharged.

Dr. Wilmot *and* The Bishop of Lincoln.Vide ante
173.

THIS Matter now coming on again, Mr. Strange and Mr. Filmer argued for the Defendant. They submitted it, that the Rule was general, that in no Case a Prohibition should go after Sentence, unless the Want of Jurisdiction appeared upon the Face of the Proceedings. For this Purpose they cited Lut. 1019. 2 Roll's Abr. 318. The Case of Argyle and Hunt, Trin. 5 Geo. 2. in this Court. 1 Cro. 97. And the Case of Parker and Wharton, Mich. 13 Geo. 1. But supposing this Point should be against them, yet still they submitted it, that it appeared by the Suggestion of the other Side, upon which the Prohibition is now moved for, that the Bishop might visit per se vel Commissarios de Triennio in Triennium; a fortiori they said the Bishop might visit by Commissaries upon a private Appeal. The Court said, that they thought both Points deserved Consideration; accordingly made the Rule absolute for the Prohibition's going, that the Plaintiff might declare in it. Vide post.

Darbey and Gould.

THIS Matter coming on again, M^r. Fazakerly submitted it, Vide ante that the Plaintiff was intitled to his Judgment. He said, it must be agreed even by the other Side, that the Plaintiff might well declare upon the Bond generally, without setting forth that it was given to him in the Name of his Office, and when the Defendant would avoid this Bond by the Statute of Hen. 6. that the Plaintiff might well reply, that it was given to him in the Name of his Office; and this will be no Departure. The Question therefore for the Consideration of the Court is, whether the Plaintiff by his Replication has sufficiently shewn, that this Bond was given to him in the Name of his Office. He has averred, that it was given *vigore & secundum formam Statuti*; and that, he submitted it, was a sufficient Averment after a *Clerici*, that this Bond was given to him in the Name of his Office. However, if this should not be taken to be a sufficient Averment after a *Clerici*; yet he apprehended, the Plaintiff ought to have Judgment; by Reason that the Issue is joined upon a collateral Matter; and thereby the Averment made unnecessary. M^r. Bennet too enforced this latter Part of the Argument by two Cases out of 1 Lev. 254. 1 Saund. 156. where such Averment is not in the Record; and yet the Plaintiff had Judgment. M^r. Dennison argued on the other Side, and said, that he conceived that neither the Want nor Insufficiency of such an Averment would be cured by a *Clerici*, and for this Purpose relied upon 2 Saund. 177. Judge Lee said, the Difficulty with him was, what Sense should be put upon the Words *vigore & secundum formam Statuti*. He did agree, that if the Sense of it was, that the Plaintiff took the Bond exactly according to the precise Terms and Directions of the Statute, this would be good after a *Clerici*, without shewing in particular, what those Directions were, that he followed. But, considering that the Defendant had pleaded that Birley took this Bond in the Plaintiff's Name, he took the Sense of that Clause to be nothing more, than that the Plaintiff took this Bond under the Statute, *absq' hoc*, that Birley took it. For which Reason, he thought that the Plaintiff had intirely omitted shewing, that he pursued the Directions of the Statute in taking the Bond; which he took to be necessary for the Plaintiff to have done, as the Case comes out upon the Defendant's Plea, in order to maintain his Action. To this Purpose he put the Case of a Man's declaring in a general Manner in Debt upon Bond, as the Plaintiff has done here, and the Defendant's pleading the Statute of H. 6. as he has done here likewise; suppose, he said, the Defendant's Plea is ill in some Point of Form, and the Plaintiff demurs specially. He took it in that Case, it has been held, that the Plaintiff in his Replication must set forth, that the Bond was given to him in the Name of his Office, otherwise the Demurrer will be bad. For which Reason he thought the Judgment ought to be arrested. However, the rest of the Court was of a different Opinion, and said, they thought the

Words

Words secundum Formam Statut' would after a Verdict imply, that the Bond was given according to the Directions and Form of the Statute; though Judge Probyn agreed, if the Words had been vigore Statut' only, it would have been otherwise. Accordingly Judgment was given for the Plaintiff.

Anonymus.

Vide ante
186.

MR. Marsh came now to New Cause, and said, that the entering a Suggestion upon the Roll, was a Thing of Right without Motion, and therefore he hoped, that the Rule that was made upon Sergeant Darnel's Motion should be discharged; which accordingly the Court did.

Nichols and Butterfield.

How far a
Paper Book
shall be said
to be regu-
larly made
up.

A Special Demurrer was made to a Declaration, for its being said Pleg' &c. without setting forth the Names of the Pledges. Upon this the Plaintiff prays Oyer of the Bill upon the File, where the Names of the Pledges were entered, and joins in Demurrer. The Paper-Book was made up according to the Bill upon the File. Mr. Draper upon this moved that the Paper-Book might be made up according to the Copy of the Declaration. Mr. Agar opposed it. But the Court said it must be so done; accordingly made a Rule for that Purpose.

The King and Knock.

How far a
Person shall
answer Inter-
rogatories, in
vinculis.

AN Attachment had been granted against the Defendant for not paying Costs; upon which he gave Bail to answer Interrogatories; but never appeared to answer them. Upon which Mr. Harvey moved, that he might be called upon his Recognizance, and answer in vinculis; which the Court accordingly granted.

Hooker and Hooker.

How far a
contingent
Remainder
shall be said
to be de-
stroyed, or
not.

THIS was a Case that came out of Chancery for the Opinion of the Court. William Hooker the Father, Elizabeth his Wife, and William Hooker his eldest Son, in 1670 joined in a Fine to certain Conusees and their Heirs, to the Use of the said Conusees and their Heirs, of the Lands in Question. In the Month of January in the same Year, the Conusees made a Deed of Lease and Release to Goldwire and Young and their Heirs, of the said Lands, to the Use of them and their Heirs during the Life of William Hooker the elder, the Remainder to the Use of the said Elizabeth for her Life, the Remainder to the Use of William Hooker the younger for his Life, Remainder to the Use of his first and every other Son in Tail Male; and for want of

of such Issue, the Remainder to the Use of his Daughters in like Manner, the Remainder to the Use of the right Heirs of William Hooker the Elder. In this Deed there was a Proviso likewise, that William Hooker the Younger might make a Jointure of the Premises on any Wife he should afterwards marry. Elizabeth Hooker entered upon the Premises, and enjoyed them during her Life. Anne, the Wife of William Hooker the Younger, at the Time of the Settlement, died; then William Hooker the Younger married a second Wife, and afterwards the present Plaintiff. Elizabeth died, and then William Hooker the Younger entered, and died seised, without any Issue. The present Plaintiff now brought her Bill in the Court of Chancery, praying amongst other Things to have Dower of this Estate; and whether William Hooker the Younger was seised of such an Estate, as that she should have Dower, was the Question. Mr. Fazakerly argued, that he was not. He said, he apprehended, that the Remainder in Fee was clearly in Abeyance, during the Life of William Hooker the Elder, and he conceived it should continue so, till the Time for vesting the contingent Remainder was determined. But admitting the Remainder in Fee should vest in William Hooker the Younger, upon the Death of his Father, and thereby the Estate for Life, and that of the Fee consolidated in him; yet he submitted it, that these two Estates were continually subject to be divided again upon the Contingency's happening, and therefore he could not be said to be seised of so fixed and settled a Fee as is necessary to give a Woman Title of Dower. Especially, he conceived, that this should be so in the present Case, by Reason that the Remainder came to him by the Act of God, and therefore that shall prejudice no one. For this Purpose he cited Lewes Bowles's Case in Coke's Reports, Raymond 28. and the Case of Boothby and Vernon, Pasc. 11 Geo. 1. There Sir Henry Boothby seised of the Lands in Question in Fee, devised the same to his only Sister, being his right Heir, for Life, and if she should die, leaving Issue at the Time of her Death, then to such Issue in Fee; but if she should have no such Issue, then to Bore Boothby in Fee. Sir Henry died, and his Sister married the Defendant, by whom she had a Son and a Daughter; the Sister died, and within seven Years after her Death, both her Children died likewise. The Defendant insisted to hold these Lands, as Tenant by the Courtesy, and the Plaintiff brought his Bill against him in the Court of Chancery, to recover the Possession. Lord Macclesfield upon this directed a Case to be made for the Opinion of the Court of Common Pleas. That Court was of Opinion against the Defendant; but the Defendant was not satisfied; and thereupon appealed from Lord Macclesfield's Decree to the Commissioners of the Great Seal; but the Decree was affirmed. The Court however were strongly of Opinion in the present Case, that the Plaintiff had a good Title of Dower. They did agree, that where the Estate for Life, and the Remainder in Fee are in one and the same Person by the same Conveyance, there shall be an Opening of these Estates, in Order that the contingent Remainder may vest. But wherever the Remainder in Fee comes to the Person that has the Estate for Life, and there is no vest-

ed Remainder between, in such Case the contingent Remainder is always destroyed; whether such coming of the Remainder in Fee is by the Act of God, or by the Act of the Party. For this Purpose the Chief Justice mentioned the Case of Hartpole and Kemp, Sir Thomas Jones 76. where there was Grandfather, Father, and Son, the Grandfather settled his Estate to the Use of himself for Life, the Remainder to the Use of the Father for Life, the Remainder to the Use of his first and every other Son in Tail Male, the Remainder to his own right Heirs. The Grandfather died before the Birth of the Grandson, whereby the Remainder in Fee came to the Father. The Court was of Opinion in that Case, that the contingent Remainder was destroyed; however this Matter stood over. Vide Post.

Manby and Manby.

How far a
Reversion
shall be said
to pass by the
Words of a
Will.

UPON a Writ of Error on a Judgment in the Common Pleas in an Action upon the Case, it appeared, that two Points had been in Issue; one, whether a certain Writing was the Will of Ventriss Manby; the other, whether by that Will the Reversion of certain Land, whereon ten Houses were built in Red-Lyon Street, was conveyed. The Plaintiff in Error was Heir at Law, and the Defendant Henry Manby claimed Part of the Reversion under this Will. To the first of these Issues the Jury found a Verdict Verdict for the Defendant; and to the other they found a Special one, which was to this Effect. Sir Richard Fisher and others were seised of the Land in Question in Fee, and in 1688 made three Building Leases of it, about sixty Years each, reserving Ground-Rents of 29 Pounds per Annum in the whole. Afterwards Sir Richard Fisher and the others assigned the Reversion of the Premises by Deed of Bargain and Sale to Ventriss Manby. On the 27th of April 1696, Ventriss Manby makes his Will, and taking notice in the beginning of it, that he intended thereby to dispose of his worldly Estate, devises 4 Pounds per Annum, Part of his 29 Pounds per Annum Ground-Rents in Red-Lyon Street, to his Daughter Sarah, he then devises the like Sum of 4 Pounds per Annum, by the same Description to his Daughter Elizabeth, the same to his Son Henry, the like to his Son Benjamin, and 6 Pounds per Annum, Part of the said 29 Pounds per Annum to his youngest Son Daniel, the Remainder of the said 29 Pounds per Ann. he devises to his Daughter Mary. All which several Rents he devises to his Children above-mentioned and their Heirs; provided that if one dies without Children, such Share shall be divided amongst the rest of them equally. He then takes Notice, that his eldest Son had been very undutiful to him; so gives him something by himself; and declares he shall take nothing farther by his Will. In 1701 the Testator died, and left his Wife sole Executrix. The Value of this Land, with the Houses upon it, amounted to 264 per Annum; and whether the Reversion of it should pass by the Name of Ground-Rents in the Will, was the Question, which the Jury left to the Discretion of the Court. Upon this Verdict the Court of Common Pleas gave Judgment for the Defendant

dant in Error. Serjeant Eyres argued now in Defence of the Judgment, and cited the Case which is reported in Moor 649. 771. and in Cro. Jac. 104. he relied likewise upon 1 Ven. 322. and a Case which is reported in Duke's Charitable Uses. One Humphrey Davis erected, as that Case states it, an Alms-house, and devised the Rent of certain Land in Support of it; the Rent was at that Time but 10l. per Annum. The Heir afterwards improved the Rent to 40l. per Annum; but would have paid the 10l. only. The Commissioners decreed him to pay the Whole 40l. per Annum. On an Appeal to Lord Chancellor he ordered a Case to be made for the Opinion of the Judges in one of the Courts; who certified, that the Land itself passed by the Devise of the Rent; and thereupon the Decree was affirmed. The Court were of Opinion in the present Case, that as the Testator declared, that he intended to dispose of all his Wordly Estate by his Will, and as he intended, that his younger Children and their Heirs should enjoy the Benefit of these Rents for ever; and as he intended to disinherit his eldest Son in every Thing, but what he gave him by express Words, that it was very natural to imagine, that the Testator intended, that the Reversion of this Land should pass by the Name of his Ground-Rents. However the Chief Justice did agree, that generally by a Devise of the Rent the Reversion will not pass. For which Reason, he said, it was very natural for Judge Gawdy to say, as it is reported in Moor 640. when the Case was first stated to him, in the Manner that he did. But this Matter stood over. Vide post.

Spring and Rugg.

THIS was a Judgment, that was regularly signed for want of a Plea; however Mr. Denison said, that the Defendant had a very honest Plea, and he put it into the Office the very Day that Judgment was signed; which Plea was, the Discharge of the Defendant under the late Insolvent Debtors Act. For which Reason he moved, that upon pleading this Matter, Payment of Costs and putting the Party in the same State as he would have been, if this Judgment had not been signed, the Judgment might be set aside. However the Court said, such Plea was not within the Meaning of their late Rule. Accordingly refused the Motion.

How far the Court of King's Bench will not set aside a Judgment that is regularly signed, by reason that the Plea which is offered to be pleaded, is not such a

one as the Defendant ought to be allowed to plead.

The King and Sir John Austin and others.

ON Rule to shew Cause, why an Information should not be granted against the Defendants for an Abuse of their Authority as Justices of Peace, the Case appeared to be in the Manner following. The Principal Defendants were three Justices of Peace, that on the 31st of June last were holding a special Sessions at Barnet for the Liberty of St. Albans.

How far the Court will not grant an Information against a Justice of Peace.

Mapson,

Mapson, who was a Distiller in Holbourn, had a little before that Time come down to Barnet, and took a House of 6 l. per Ann. there, which he put a Woman into to sell Strong Waters. A few Days before this Sessions the Church-wardens came to Mapson, and told him, they did not know who he was, that was come into their Parish, and therefore he must appear at this Sessions to shew Cause, why he should not be removed out of it. When this Sessions was held, the Church-wardens made their Complaint there against him, upon which the Justices sent him a civil Message to desire him to come. Mapson refused coming without a Warrant. They sent to him a second Time, and he gave the same Answer. Upon which they directed their Clerk to make out a Warrant; but the Clerk said, he could not, by Reason that no Body could inform him, what the Name of this Person was. The Justices upon this ordered the Constable who carried the former Message, to bring him by Force, if he would not come otherwise. The Constable accordingly did bring him by Force. When he came before the Justices he behaved himself in a very insulting Manner, throwing his Hands about, and was very near striking one of them. Upon this they sent for a Pennyworth of Whipcord and tied his Hands to his Sides, to prevent his doing Mischief. He would give no sort of Account of himself, but said, he was as good a Man as any of them were; and upon that they made out a Warrant for carrying him to Hartford Gaol. He offered Bail to this Warrant; but the Justices, not knowing the Circumstances of the Persons he did offer, refused to accept them. In the Evening he made an Escape from the Constable, who had the Warrant to carry him to Gaol. The next Day he came to Sir John Austin's own House, who was one of the three Justices, brought with him there undeniable Bail; but Sir John refused bailing him; and accordingly committed him to Hertford Gaol for a Contempt done to the special Sessions. He brought his Habeas Corpus upon this Commitment, and the Warrant for committing him for the Contempt was returned with it; and then he was bailed. The Question upon this State of the Case was, whether the Rule ought to be made absolute for the Information. Mr. Fazakerly argued, that it ought; he said, he did agree, that Mapson, when he was brought before the Justices behaved himself in an improper Manner. But he Apprehended, that Mapson was brought before them illegally; by Reason that there was no Warrant to bring him; and then it was no Wonder, that he treated the Justices in the Manner that he did. The binding his Hands with Whipcord too was a farther Aggravation of their Fault. No Man but a Felon ought to be used so. And then he conceived farther, that the refusing to bail him was absolutely unwarrantable. These Observations, he said, might be made, even upon a Supposition, that the Fact really was, as upon hearing the Defendants Affidavits it seems probable enough to be. But he observed, that upon the Case, as it is stated by two Affidavits on the Part of the Complainant, a much heavier Charge is made against them. He took Notice, that before the Statute of 4 & 5 W. & M. 18. Informations were filed by the

Coroner

Coroner of course upon every Complaint laid before him. That Statute indeed has provided, that the Coroner shall not file them without Leave of the Court. But he submitted it, that when Facts are stated one way on the Part of the Complainant, denied and stated another Way on the Part of the Defendant, that was a sufficient Reason for the Court to order the Coroner to file an Information, that the Fact may be tried, so that taking this Case to be either Way, he hoped, the Rule should be made absolute. Judge Lee declared, that in granting Informations of this sort he did not take the Rule to be, as Mr. Fazakerly had mentioned. In Informations of a Quo Warranto, which are to try a Right, he agreed that Rule was just. But in Informations to punish a Man for a Crime, wherever the Fact is denied by the Defendants, he took it the Court always refuses granting it, and leaves the Party to his ordinary Remedy. He remembered too, that this Distinction was expressly resolved by the Court upon Debate, in a Case which Lord Lechmere was concerned in. However the Court agreed, that in the present Case, the Facts complained of were not so much denied by the Defendants, as stated in a different Light by Means of additional Circumstances; and the real State of the Case they took clearly to be in the Manner that has been mentioned. They then began to consider the Objections that had been made in respect of the Justices. As to there being no Warrant, they said, this was not a Charge of a Criminal Matter that Mapson was accused of, and therefore a Summons was much more proper than a Warrant in this Case; and that there was what amounted to a Summons in this Case, they clearly agreed. Judge Probyn for his Part said too, that he thought the Justices might well have made an Order for removing Mapson out of the Parish, without examining him himself, in as much as he refused to come before them; for which Reason he should have thought, that if they had made a Warrant it would have been illegal. But Judge Page said, his Opinion was, that they could not have made such Order without examining the Party himself; for which Reason he should have thought, that the Warrant had been very legal. Then as to the Tying his Hands the whole Court agreed it was very justifiable according to the Circumstances of this Case. And as to the Contempt, as it was done in open Court at a special Sessions, which is a Court of Record, they said it was in their Discretion, whether they would Bail him, or not. And when a Commitment for a Contempt in open Court is returned upon a Habeas Corpus, regularly speaking this Court does not inquire into the Causes of it. For which Reason the Rule for the Information was discharged.

Winchlet and Hurghley.

When an Action is brought against the Indorser of a Promissory Note, how far it need not be set

IN an Action against the Indorser of a Promissory Note, there was a special Demurrer to the Declaration, because there was no Demand set forth to have been made upon the Drawer. M^r. Taylor however moved for Judgment for the Plaintiff; and no Body being on the other Side, the Court gave Judgment accordingly. Chief Justice absent.

forth in the Declaration that any Demand was made upon the Drawer.

Anonymus.

How far the Court will grant an Information against Church-wardens.

ON Rule to shew Cause, why an Information should not be granted against the Church-wardens and Overseers of Lambeth Parish for publishing a Libel upon the Trustees of a Workhouse there, the Case appeared to be this. On the 17th of August last, Notice was given in Lambeth Church by the Church-wardens and Overseers, That whereas the usual Time for Meeting by the Trustees of this Workhouse had been on a Sunday, they should henceforth meet on a Thursday. The Sunday after a Notice was given by the Trustees, contradicting the former Notice, and declaring, that the Meeting would continue to be on a Sunday. The Sunday after, that the Church-wardens and Overseers ordered another Notice in Writing to be read in the Church, declaring that the Meeting would be on a Thursday, notwithstanding the Abuses in this Trust that had been suffered by the Trustees under their pretended Authority. Serjeant Corbet submitted it now to the Court, that this was only a Dispute about a Right between the Church-wardens and Trustees; and therefore this could not be called a Libel. Judge Page agreed, that if the Church-wardens and Overseers had only declared by this Writing, that the Trustees acted under a pretended Authority, the Court would not grant an Information. But as this Writing charged them with Abuses in that Authority, the Court thought proper to make the Rule absolute.

The King and Clendon.

When a Person is committed for a Contempt, how far his own Recognizance shall not be taken.

THE Defendant having been committed for a Contempt, M^r. Strange moved, that he might be bailed to answer Interrogatories. He said, that they had given Notice indeed of their Bail; but he apprehended, that the Party's own Recognizance would be sufficient. M^r. Masterman said, that formerly the Party's own Recognizance used to be thought sufficient; but of late Years the Court has always insisted upon Sureties. Accordingly upon the Defendant's not having one of his Sureties here, the Court did nothing upon the Motion.

The

The King *and* The Inhabitants of Woodsterton.

THIS was an Order of two Justices made upon the Officers of the Parish of Woodsterton, for paying 5 Pounds upon Account of a poor Inhabitant of that Town, when he was in Gaol, and likewise for paying a Surgeon's Bill, that was due upon his Account; which Order had been confirmed at the Sessions. Mr. Wirley moved, that both might be quashed by Reason of several Exceptions to the original Order; First, that it is not said in the Order, that it was made under Hand and Seal. Secondly, That it does not appear to have been made upon examining the Party on his Oath. Thirdly, That it is neither averred in the Order, that the Justices, who made it, lived within the Parish, nor that there were no Justices living within it; one of which Averments ought necessarily to have been made. Fourthly, That the previous Steps of applying to a Vestry or two Overseers of the Parish were not observed; which ought to have been, by the Statute of 9 Geo. 1. Accordingly the Court made a Rule to shew Cause. Vide Post. 247.

Concerning what Things Justices of Peace cannot make an Order upon Overseers.

Anonymus.

ON Rule to shew Cause, why a Certiorari should not go to the Justices of the County of Stafford, for removing some Orders up, made upon the Parish of Exon, requiring them to be contributory to the Inship of Tindal, the Inship of Tindal having already had a Rule made upon them for above 6 d. in the Pound, towards the Repairs of the Highways within that Inship. Mr. Lacy said, that he did agree, that Certiorari's were taken away by the Statute of 3 & 4 W. 12. Sect. 3. from removing up Orders made upon Parishes in general for not repairing the Highways. But the present Order, he said, was founded upon 7 & 8 Will. 29. and therefore he apprehended, that the Certiorari would well lie. However, the Court had some Doubts, whether it would in as much as the second Statute has a Relation to the first, and the Order to be made upon the Parish at large in this Case, is to be made after the same manner as in the other. Accordingly the Rule was enlarged.

How far a Certiorari shall be said to be taken away within the Meaning of the Statute of 7 & 8 W. 29. relating to the Highways.

Dobson and others *against* Dobson.

SErjeant Chappel came now to answer the Objections. The Words of the Act, he said, were, That the Widow shall recover her Damages from the Death of her Husband. And the Meaning of Lord Coke in the Place before cited, can only relate to such Instances, where the Heir has made an Offer of the Dower, immediately after the Death of his Ancestor, and the Widow has refused accepting it. He said too, that the Construction of that Clause in the Statute, which ascertains the Time to which Damages

Vide ante 180.

mages are to be recovered, might reasonably be understood to be, that the Damages shall be given to the Time of final Judgment; for till then the Plaintiff has not the complete Benefit of her Action. Then as to the Exception taken for its being said, *Et sum' &c.* he observed, the Precedents were all in that short way. As to the Grand Cape, he said, there is a Day given to the Demandant at the Return of the Writ; for it is said, he did appear at the Return of it. But he submitted it, that it was not necessary to be averred in express Words, that he appeared and demanded the Writ; for by its being said, that he demanded the Writ, it must be understood that he came into Court to demand it; there being no other Place where he could demand it. And so is the Entry in Rast. 236. b. relating to an *Habere facias Scisnam*, and Coke's Entries 181. Then as to the Exception that has been taken, because it is not averred *nec eorum aliquis venit*, he observed, that in real Actions Several Tenure was a good Plea, and as the present Tenants have not pleaded that, it shall be taken that they were Joint-Tenants. Now he submitted it, that in the Case of Joint-Tenants, the Default of one is the Default of all; and therefore there was no Occasion for such an Averment as has been insisted on. For this Purpose he cited too Rast. 234, 235, 237. Then as to the Continuances, he said, they were *ad prox' Session'*, as has been mentioned. But he observed, that it was not known when the next Sessions will be, as it is when the next Term will, in the Courts above. For which Reason the Continuances can be in no other Way. He said, the Courts in Counties Palatine are Superior Courts, and therefore the Courts above will judicially take Notice of their Proceedings. And as to the last Exception, he said, it appears by all the Precedents ever since the Act, that the Jury have constantly given something for Damages, besides the Value of the Land; and therefore however strong the Words of the Act may be, that the Value of the Land is to be the Measure of the Damages, he conceived that a Judgment shall not be reversed, that has followed the Precedents that have been of so ancient a Date. For which Reason, he hoped, that the Judgment should be affirmed in the whole. The Court said, that their principal Doubt was in Relation to the Time to which the Damages are given. Upon which Serjeant Chappell said, that supposing there should be a Mistake in the Quantum of the Damages that are given, yet that is no more than a Miscomputation by the Court; and he cited the Case of *Green and Chesson*, Mich 12 Geo. 1. where for such Cause the Court refused to reverse a Judgment. Judge Page said, that he conceived this was not a Miscomputation in the Court. For by the Writ of Inquiry the Jury have found the Time when the Husband of the Demandant died, the yearly Value of the Land, and that five Years and two Months elapsed from the Time of his Death to the Time that the Writ of Inquiry was executed. Upon this the Court have computed what that Sum amounts to, and have given the whole of it; so that the Fault, if any, is not in the Miscomputation of the Damages by the Court, but in their giving them for a longer Time than they ought.

The Serjeant upon this submitted it, that the Court might abridge the Damages, and rectify them. The Court said, that this Matter deserved farther Consideration; so ordered it to stand over. Vide Post.

Gore and Gore.

THIS was a Case that came out of Chancery for the Opinion of the Court. Mr. Bootle stated the Fact to be in the Manner following; William Gore was seised of the Lands in Question in Fee-simple, and by his Will bearing Date the 4th of July 1718 devised the same to certain Trustees, for the Term of 300 Years, in order that certain Debts and Legacies might be paid out of the Profits of them, the Remainder to the first Son of Thomas, who was his eldest Son, which should be begotten in Tail Male, the Remainder to Edward his second Son for Life, and afterwards to his Issue in Tail Male, the Remainder to William his third Son, in like Manner, the Remainder to his own right Heirs. Soon after the Testator died; Thomas his eldest Son was not then married, but afterwards did marry, and had Issue the present Defendant. Edward died without Issue Male; and William the third Son of the Testator was the Plaintiff. Mr. Bootle now argued for the Plaintiff, and submitted it, that he had a good Title. The principal Question, he said, would be, whether the Defendant can claim these Lands by way of executory Devise. Now as to that, he submitted it, that the Rule of Law was, that no Person can take by executory Devise, unless he was either in Being at the Death of the Devisor, or at least must necessarily be in Being upon the Determination of some Life or Lives nominated by the Will. For this Purpose he said the Argument of Lord Chief Justice Treby, in the Case of Scaterwood and Edge, taken Notice of in Salk. 229. but not fully, was very material. He said he had his Argument taken by a Gentleman in Short-hand, that attended at that Time, and he believed it was taken justly. He said the State of that Case was in this Manner; Edge was seised of certain Lands in Fee, and devised them to Trustees for 11 Years, the Remainder to the first Son begotten of the Body of George Jaques, in Tail Male, the Remainder to the rest of the Sons of George Jaques in like Manner, provided they should take upon them the Name of Edge; and if they should not take upon them that Name, or if they should die without Issue, the Remainder to the first Son of Richard Conway in Tail Male, and so on to the rest of the Sons of Richard Conway, provided they should take upon them the Name of Edge, the Remainder to his own right Heirs. George Jaques had no Son begotten on his Body at the Time of the Death of the Devisor; Richard Conway had one at that Time, who was the Defendant in that Action. Afterwards George Jaques had a Son, who was the then Plaintiff. Upon this Matter found by Special Verdict Lord Chief Justice Treby declared his Opinion in the Manner following. As for executory Devises, said he, they were complained of in a few Years after the introducing of

What shall be said to be a good executory Devise.

them, and those that did introduce them lived to repent it. The Bounds to these Devises, however, he said were set; and they were restrained to a Life or Lives in Being. For if the Candles are all lighted, it is well. Possibly, he said, it may be good to make the Heir of a Person capable, though the Person himself was living at the Death of the Devisor, for that must take Effect at the Instant the Person dies; but he was not for going an Inch farther. And he put the Case of a Child in *Ventre sa Mere*; and he held that such Child would not be capable of taking. Accordingly his Opinion was for the then Defendant. Judge Powel and another of the Judges of the Common Pleas were of Opinion for the Defendant likewise. But they, indeed, chose rather to give a different Reason, viz. that the Words, to the first Son of George Jaques, were *de præsenti, they being to his first Son begotten*. Judge Blincoe too was of Opinion with the Plaintiff. However, Mr. Bootle submitted it, that the Reason given by those two Judges was not the true one; for Lord Coke says, that the Words *procreatis* and *procreandis* are synonymous. But the Reason given by Lord Chief Justice Treby ought to be relied upon. And he said this Judgment was affirmed upon a Writ of Error. If this Reasoning of Lord Treby was to be relied upon, he apprehended it was in Point for his present Purpose. For Thomas the eldest son of William Gore had no Issue till after the Death of the Devisor; and it was possible, that he might have had none till 40 Weeks after his own Death. He observed farther, that the Term of 500 Years, which was to be satisfied before the Issue of Thomas could take, was another strong Objection against him. In the Case before cited, there was a Term of 11 Years, and Lord Treby said 10 Years, or perhaps 20 might be allowed; he would not confine it to any certain Number of Years; and therefore Mr. Bootle did agree, that the Term of 11 Years was held to be no Objection in that Case. But by the Reasoning of that Chief Justice upon that Term, he conceived, that it fully appeared, that the Term of 500 Years could never be allowed. He observed too, that there was no Occasion for him to rely singly upon the Authority of the Case before cited; for there were many others very strong for him; and particularly cited 2 Cro. 459. Pal. 355. Sir William Jones 15. Rol. Ab. 613. 1 Sid. 37. 3 Keb. 127, 178. He said farther, that he apprehended the Court had given their Opinions before upon this very Point, upon a Case sent them out of Chancery in 1720. Serjeant Chappel argued on the other Side, and said, he did agree, that the Case which Mr. Bootle had stated, was pretty much the same with that which came out of Chancery in 1720; but in the Case that is now sent, there are many Facts stated, which were intirely omitted out of the other Case. For which Reason he stated the Facts particularly in the Manner that they now appear before the Court. The Testator had five Children at the Time he made his Will, and likewise at the Time of his Death, Thomas, Edward, William, Esther and Anne. To Thomas he bequeaths an Annuity only of 50 Pounds per Ann. and gives his Reasons for it, because he had already laid out a great deal of Money upon him, and likewise because he would be intitled to have an Estate of 400 Pounds per Annum an-
other

other way. To Edward he gives 2000 l. to be paid as soon as may be after his Death. To Esther he gives 1500 l. to be paid in like Manner; and to William and Anne he leaves considerable Legacies likewise. The Lands in Question he devises to Trustees for Five hundred Years for the Purposes that have been mentioned. He then gives a Power to Thomas to make a Jointure of them; so as he settles but 10 l. per Annum for every 1000 l. he has with his Wife. The Remainder of these Lands he devises to the first Son, which shall be begotten on the Body of Thomas in Tail Male, and so on to every other Son of Thomas in like Manner. The Remainder to Edward for his Life with Power to make a Jointure, and Leases likewise, and afterwards to his Issue in Tail Male. The Remainder to William in like Manner; but provides, that if either Edward or William should happen to come to the Estate; before their Legacies can be raised; then such Legacies should not be paid to them. And then limits a Remainder to his own right Heirs. Upon this State of the Case he said, he submitted it, that here was a plain Estate by Implication given to Thomas till he should have Issue; and if so the Devise would be clearly good to his first Son by Way of contingent Remainder. He said, there is a Power given to Thomas to make a Jointure; but not to make Leases; which is an Argument, that he was to have this Estate till the Birth of his Son, though not to prejudice him. He observed farther, that Edward and William had Legacies given them to provide for them for the present; which is another Argument, that they were not to have the Estate immediately; nay, it is expressly provided, that if the Estate does fall to them before their Legacies are paid, they shall not be paid at all. However, he said, if this Point should go against the Defendant, he submitted it, that he might well take by Way of Executory Devise. For the Testator speaks per verba de futuro; he gives the Remainder of his Estate to the first Son of Thomas Gore, which shall be begotten; and then the Authority of two of the Judges in the Case that has been cited, is expressly with him. He said, that he apprehended the Law was clear, that a Posthumous Child, when taken Notice of as such, is capable of taking by way of Executory Devise. He did agree, that a Devise to the Heirs of J. S. was not good per verba de presenti; and so it was allowed by those two Judges in the Case above mentioned. But they expressly declared their Opinions, that a Posthumous Child taken Notice of as such, which must be per verba de futuro; was capable of taking by Executory Devise. And so he said, is the express Authority of 1 Roll Abr. 612. He likewise cited 2 Cro. 394. Raym. 82. 1 Sid. 153. 2 Mod. 289. Salk. 254. The Chief Justice seemed clear of Opinion, that the first Son of Thomas could not take by Way of contingent Remainder; because the Devise plainly intended, that Thomas should have nothing by his Will, but the Annuity of 50 l. per Annum; and therefore he could not design, that Thomas should have a Freehold in this Estate to support a contingent Remainder. However, he said, it was a Matter which deserved Consideration, whether the first Son of Thomas could not take by Way of Executory Devise. He said,

said, it must be agreed beyond all Question, that if this Estate was not to vest in him till the Term of 500 Years was satisfied for the Purposes which it was made for, this Devise must be wholly void to him; but he did not think, that the Term would make any hindrance, but that the Estate might vest in him upon his Birth; though he should not have the Possession of it indeed, till the Purposes of the Term were satisfied. The principal Objection to this Devise, he said, arises from the Authority of Lord Chief Justice Treby in the Case that has been cited; and he did agree, that the Opinion of that Chief Justice had been truly stated. But the two other Judges seemed intirely to found their Opinion upon the Reason, that the Devise was to take Effect per verba de presenti; admitting, that if it had been per verba de futuro, as the present Case is, that it would have been good. He took Notice, that in the Writ of Error that was brought upon that Judgment he was of Counsel; and Lord Holt declared at that Time, that there was no certain Bound, which the Law had set to these Executory Devises. He said too, that he had known it solemnly determined, that such Devise may be good for a Year longer than any Life in Being. And therefore he doubted, whether there was any other Rule which the Court could go by in judging upon such Devise, than to consider, whether it tended to a Perpetuity or not. Judge Page said too, that that was always his Opinion. However the Matter stood over. Vide post.

Acherley and Vernon.

How far a Court of Equity can grant a perpetual Injunction.

Canc. **U**PON a Bill brought to have a perpetual Injunction, the Defendant pleaded to the Jurisdiction of the Court against granting such Injunctions. But it was said, that there have been several Instances, in which such Injunctions have been granted. The first was in the Case of The Earl of Bath and Shering, and was done by Order of the House of Lords upon an Appeal. Another was between Leighton and Leighton. Accordingly Lord Chancellor put off the Consideration, whether it should so be done in the present Case, till the Hearing of the Cause.

Lamb and Chapman.

Vide ante 168.

THE Attorney General came now and said, that he had no Intentions to argue this Case at present, but only to offer some Reasons to the Court, why the State of the Case should be something altered. He said, as the Case was drawn up, it was expressly stated, that the Goods in Question were not bought by Way of Merchandize. He did agree, that if it was the Intent of the Jury to find the Fact according to those very Words, the Plaintiff must have his Judgment. For those are the Words of the Statute of 12 Car. 2. 4. that such Goods only that are brought in by Way of Merchandize, shall pay Duty;

Duty; and all the subsequent Statutes, that have laid Duties upon Foreign Goods, have been construed to have relation to that. But he observed, that it was not necessary, that the Goods in Question should have been bought with an Intention to be sold again to make them to be within the Meaning of the Statute of Car. Goods bought by Way of Merchandize. And of that Opinion was the Court of Common Pleas unanimously in the Case of Pourkney and Bower; though indeed they differed in the principal Point before them, which was, whether Wreck'd Goods should pay Duty; Lord Chief Justice Treby was of Opinion, that they should; the other Judges of the contrary one. And he said, he apprehended it to be clear, that Furniture bought abroad must pay Duty, though it was never bought with an Intent to be sold again. Now he submitted it, that the Jury might very possibly mean in the present Case nothing more, than that the Goods in Question were not bought with an Intent to be sold again. And if so he desired that the State of the Case might be altered in that Manner. The Chief Justice said, that he understood the Meaning of the Jury to be to find the Fact exactly according to the Words, which they had stated it in; and therefore the Case could not be altered. Accordingly Judgment was given for the Plaintiff.

Throgmorton and Norton.

MR. Strange moved for the Court's Direction of the Master to tax Costs for want of a good Countermand of Notice of Trial. The Rule of the Court in this Point, he said, he apprehended, was, that two Days Countermand is requisite in a Town Cause, four Days in a Country Cause. This Action was an Ejectment that was to be tried at Warwick; and the Assize Day was the 19th of August last; but the Countermand was only given on the 16th. Accordingly the Court directed the Master to allow the Defendant his Costs for want of a sufficient Countermand.

What shall not be said to be a sufficient Countermand of a Notice of Trial.

The King and Palmer.

UPON Complaint of M^r. Budgel against the Defendant, who was a Bailiff, for refusing to carry him to the House which he appointed, and for not reading the Clause in the Statute of 2 Geo. 2. when he Arrested him; the Court ordered the Defendant to pay M^r. Budgel 5 l. for his Damages, together with his Costs; and likewise committed him for the Contempt.

Construction upon the Statute of 2 Geo. 2. relating to Arrests.

Anonymus.

How far a Writ of Inquiry shall be said to be unduly executed in respect of the Time of the Execution of it.

ON Motion by M^r. Theede to set aside a Writ of Inquiry for its being executed at Half an Hour after 12, whereas the Notice was for executing it between 10 and 12. The Court was of Opinion, that the Party ought to have staid an Hour after the Time mentioned for executing it. Accordingly refused the Motion. Chief Justice absent.

The King and Hayward.

How far a Person's own Recognizance shall not be taken alone without other Sureties.

MR. Hayward moved, that the Defendant's own Recognizance might be taken to answer Interrogatories; he being one of the Justices of the Court. Judge Page said, that formerly their own Recognizances used to be taken upon such Occasions, but not of late. Accordingly two Persons were bound Sureties with him, their Recognizance in 20 l. each; his own in 40 l. Chief Justice absent.

Anonymus.

How far a Certiorari may be granted to Justices of Oyer and Terminer, in order to remove up an Indictment for a Misdemeanor.

MR. Fazakerly moved for a Certiorari to remove an Indictment for a Nuisance found at the Assizes in Shropshire. He did agree, that regularly speaking the Court does not grant these Certiorari's; but the Reason for asking it in this Case, he said, was, because the Defendant wanted a View; which he could not have granted him at the Assizes. Accordingly the Court made a Rule to shew Cause.

Daniel and Purkurst.

When the Court sets aside a Verdict that is had upon a Writ of Inquiry, how far Costs are to be paid or not.

MR. Parker moved to make a Rule absolute for setting aside a Writ of Inquiry, and that without Costs, by Reason that the Jury had found a Verdict for the Defendant, whereas they necessarily ought to have found for the Plaintiff, though they had given but a Penny Damages. Regularly speaking he did agree the Party must pay Costs, where he moves to set a Verdict aside; but in the present Case the Jury have found a Verdict contrary to the Record; and in such Case the Court of Common Pleas lately set a Verdict aside without obliging the Party to pay Costs. The Name of that was The Earl of Rochford and The Bishop of Norwich, in Quare Impedit, Trin. 5 Geo. 2. The Plaintiff there had a Verdict at the Assizes; a Writ of Inquiry was afterwards awarded to inquire of the Value of the Church, and of the other Matters in Pursuance of the Statute of Westminster. Upon that Writ of Inquiry the Jury found, that there was no such Church as that in Question. On Motion to set aside that Inquest, as being contrary to the Record, the Court did set

set it aside, and that without Costs. Judge Lee said, that in the famous Bewdley Case, the Court made the Party pay Costs, that moved to set aside the Verdict; though the Jury gave it expressly contrary to the Direction of the Court. But Judge Page said, suppose the Issue was between A. and B. and the Jury find a Verdict for C. he thought the Court would set that Verdict aside without Costs. The Chief Justice inclined too to be of Opinion, that there ought to be no Costs in this Case. However enlarged the Rule. Vide Post.

Anonymus.

A NN Black, a Negroe, had been committed to Bridewell by a Justice of Peace; and now upon a Return to a Habeas Corpus the Form of the Commitment appeared to be, to require the Keeper of Bridewell to keep this Woman in Custody for assaulting her Master, and being a loose, idle and disorderly Person, for want of Sureties to keep her in Custody. Mr. Kettleby moved that she might be bailed. He said, this was a Commitment by one Justice of Peace, and as he thought, clearly no Conviction. Mr. Reeves on the other Side argued, and submitted it, that one Justice of Peace had a Power of convicting a Person for being loose, idle and disorderly; and he apprehended, that this was a Conviction in the present Case. The Consequence of which was, that this Court would not interpose and bail the Defendant. But the Court said, that the Words of the present Commitment were, For want of Sureties keep the Defendant in Custody; so that she was no longer to be kept, than till she was able to find Sureties; for which Reason they were of Opinion, that she ought to be bailed. Upon this Mr. Reeves said, that there would be Occasion then to lay a farther State of this Matter before the Court. The Defendant he observed was a Negroe, and by the Laws of the Plantations abroad the Master has a Property in her; which Property, he submitted it, was not altered by her coming with her Master into England. Now if the Court should bail the Defendant, the Court must take away from the Master that Custody of his Property, which he is intitled to, and must deliver her into the Custody of her Bail. The Court said they would not enter into an Inquiry of that Matter upon this Motion for bailing the Defendant; and therefore inquired who was her Bail. It was suggested upon this, that she was a married Woman, and that her Husband's Name was Carter; but that was denied by the other Side. However, the Court said, that if there was any Doubt of that Matter, they would certainly not take her own Recognizance. Upon which Carter, her supposed Husband, entered into a Recognizance for her, and she had two other Bail likewise. Accordingly she was bound over for her Appearance at the next Westminster Sessions, by the Name of Anne Carter, alias Anne Black, and then the Court discharged her.

When a Person is committed for being a loose, idle and disorderly Person, how far the Court will Bail in such kind of Cases.

Banks and Doyley.

How far the Court will be able to Plea of Privilege, by Reason that there is no Affidavit annexed to it.

A Few days ago Mr. Parker had obtained a Rule for setting aside a Plea of Privilege, there being a Writ of Privilege; but no Affidavit annexed to it. Mr. Proctor came now and moved to discharge it, by Reason that, as he apprehended, the Writ of Privilege itself was sufficient. But the Court said, that it is not ascertained by the Writ of Privilege, that the Defendant was an Attorney of the Common Pleas at the Time of the Action commenced against him in this Court; for which Reason they thought, that an Affidavit ought to have been annexed to the Plea, accordingly refused to discharge the Rule.

Wrench and Hixon and others.

What kind of Plea need not be under Counsel's Hand.

UPON the Master's Report, the Case came out to be in the Manner following. In an Action brought against two Executors, they pleaded distinct Pleas; one, Ne unques Executor; the other, Plene Administravit. The Plene Administravit was signed under Counsel's Hand; but not the Ne unques Executor. Both these Pleas were brought upon one Piece of Paper; and appeared upon the Face of them as one Plea; but no Counsel's Hand was at the Bottom of them. However the Plaintiff's Attorney accepted them; but afterwards signed his Judgment against both the Executors, taking it for granted, that these were no Pleas for want of Counsel's Hand to them. As soon as he had signed this Judgment, he entered it up against both; and took out Execution accordingly. Mr. Fazakerly now argued for the Plaintiff, and submitted it, that the Plea of Ne unques Executor ought to have been signed by Counsel, as well as the Plea of Plene Administravit. And though the Plaintiff's Attorney made no Objection to it at the Time he received it; yet he apprehended it was as no Plea; and consequently the Plaintiff was well intitled to sign his Judgment against him. And if he could sign it against him, there was no Question but he might sign it against the other Executor; for to that Plea there undeniably ought to have been a Counsel's Hand appearing upon the Paper which was brought by the Plaintiff's Attorney. However, he said, if there were any Doubts upon the first Point, whether that Plea ought to have been signed by Counsel; yet as both these Pleas were upon one Piece of Paper, and appeared upon the Face of them as one, a Defect in the last shall prejudice the first, as much as if there was a Defect in both. He submitted it likewise, that the whole ought to have been left with the Clerk of the Papers, as both Pleas were upon one Piece of Paper, and as one Plea; whereas in the present Case, only the last Plea was left with him; and for that Reason likewise he apprehended that the Judgment was regularly signed as to both Executors. The whole Court were clear of Opinion that the Plea of Ne unques Executor was good, without being signed by

by Counsel; and though this Plea was delivered upon the same Piece of Paper with the other as one Plea; yet they thought any Defect in that could not prejudice this; for which Reason they thought the Judgment signed against him clearly irregular. And Judge Page put the Case of *Crespals* being brought against two Defendants; one of them pleads Not guilty; the other justifies; the Justification is not signed by Counsel, as it ought; both these Pleas are delivered upon one Piece of Paper as one Plea; yet he said that Defect in the Justification could not make the other Plea bad likewise. He said farther, that he doubted, whether the Plaintiff could sign his Judgment even against that Executor, whose Plea ought to have been signed by Counsel, in as much as he accepted of the Plea; and neither demurred nor rejected it, one of which he ought to have done. However as to that the Chief Justice and Judge Probyn said, they thought the Plaintiff might well have signed his Judgment against that Executor for want of a Plea, notwithstanding he did not reject it; for a Plea not signed by Counsel, which ought to be signed by him, is as no Plea. *Mr. Fazakerly* upon that submitted it, that since the Opinion of the Court appeared to be, that the Plaintiff might well have signed his Judgment against that Executor singly, the Court would not set aside the Judgment as to him; for in these Cases the Court goes no farther back, than to see where the Irregularity begins. However the Court said, in as much as the Plaintiff had entered up his Judgment intire against both in Pursuance of the signing, they would set the intire Judgment aside; which they did accordingly; and awarded Restitution likewise.

Berington and Barker.

A Few Days ago *Mr. Abney* had obtained a Rule to shew Cause, why a Declaration in Ejectment should not be amended by striking out the Words *Middlesex* amongst these Words, *Quæ quidem Billa sequitur in hæc Verba Middlesex scilicet*, and by putting in the Words *Bucks* in the Room of it; and by striking out the Words *Tenomen*, and putting in the Words *Dimiss* in the Room of it; and farther by striking out the Words *quinque solidi Reddit pro Vic Franc Pleg*, without putting in any other in the Room of them. He did agree at that Time, that the Tenants had entered into the Rule to confess Lease, Entry and Distress. But he said, there had been Instances of Amendments in Declarations made later than this is; and particularly cited the Case of an Action upon the Statute of Hue and Cry brought against the Hundred of Bouthleygrosford in the Court of Common Pleas 1726. The Court allowed them there to amend after Issue joined. And he cited likewise another Case of *Harsel and Grovenor*, in an Action brought against a Sheriff for not taking sufficient Pledges; and the Court allowed them there to amend even after the Cause had been carried down to Trial. A Day or two after *Mr. Fazakerly* came to shew Cause; and said, that in an Ejectment the Court will not allow of any Amendments in the Declaration after the Tenants have made

How far the Court will give Liberty that a Declaration in Ejectment shall be amended.

themselves Defendants; for by entering into the Rule they agree to be Defendants only to such Declaration, as was delivered to them below. For that Reason, he said, it has been held, that no Amendment shall be made after that by adding another Lessor, other Lands, other County, or even other Day of the Demise. Upon this Mr. Abney said, that the Declaration was right, and the Copy of the Issue was only wrong; and he thought clearly, that the Copy of the Issue might be made agreeable to the Declaration. Accordingly the Court said, that this Rule is drawn up wrong; for which Reason they discharged it; and presently after made another Rule upon his Motion to shew Cause, why the Copy of the Issue should not be made agreeable to the Declaration. Mr. Fazakerly now came to shew Cause upon this Rule. He said, he did agree, that the Bill upon the File did warrant the Amendments; but in an Amendment the Copy of the Issue can only be amended by the Declaration delivered below to the Tenants. For which Reason that Declaration ought to have been shewn to the Court at the Time the Rule was made, and an Affidavit should have been annexed to it to verify, that this was the true Declaration delivered; this Affidavit, he said, likewise ought to have been mentioned in the Rule; but nothing of this has been done, and therefore he hoped, that this Rule should be discharged likewise. The Court said, this Affidavit is only to ascertain what Declaration was delivered to the Tenants; and therefore they thought the Plaintiff was not too late to produce it now: which accordingly he did. However upon looking into it it appeared, that the Copy of the Issue was in every Thing agreeable to this Declaration, but in the Word Middlesex; there was indeed a Mistake in that, and the Word Bucks was in the Declaration delivered. For which Reason the Court made the Rule absolute for this Amendment; but discharged the Rule as to the rest.

Anonymus.

Vide ante
206.

MR. Reeves moved for a Rule to inspect the Vestry-Books, in order to be able to lay some Facts in the Information for the Libel against the Church-wardens and Overseers of Lambeth Parish. But the Court refused it, as the Intent of the Motion was to get Evidence from the Defendants themselves in order to charge them in a Criminal Prosecution. Vide post.

Term. Hill.

6 Geo. II. 1732.

The King *and* Sturgeon.

THE Defendant being an Attorney, and having been brought up upon an Attachment for a Misdemeanor in Practice, Mr. Lacey moved, that he might answer Interrogatories in Vinculis, and not be bailed, by Reason that he had been ordered to attend twice, but never did attend, in Contempt of the Court. Mr. Strange submitted it on the other Side, that the ordinary Course of the Court was to bail Persons who are taken upon these Attachments. But the Court said, at least he ought to be committed at present for the Contempt in disobeying the former Rules. And Judge Probyn gave his Reason for it, that otherwise those Contempts would go unpunished; for the Interrogatories must be confined to the Facts charged in the Affidavits; and these Facts relating to the Contempts could not be inserted in the Affidavits; because they happened subsequent. Accordingly the Defendant was committed.

When an Attorney is brought up upon an Attachment for a Contempt, how far the Court will direct, or not, that he shall answer Interrogatories, in Vinculis.

Chadock *and* Laughton.

MR. Parker moved to set aside an interlocutory Judgment for a Variance between the Latitat and the Declaration; the Latitat being by the Name of Chadock, the Declaration by the Name of Chadock. Accordingly the Court made a Rule to refer this Matter to the Master.

How far the Court will set aside a Judgment, by Reason of a Variance between the Latitat and the Declaration.

Anonymus.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not be granted against one Boreman for exercising the Office of Capital Burgees of the Borough of Yarmouth in the Isle of Wight, and likewise why such Information should not be granted against another Person, for

notwithstanding the Length of Time that the Party has been in Possession of his Office, exercising

How far the Court will grant an Information in the Nature of a Quo Warranto,

exercising the Office of Mayor in the same Borough; Serjeant Belfield said that he submitted it, that the Court would not make a Rule absolute against Boreman, because he had continued in this Office ever since the Year 1697, and that till the Year 1715 his Election was never so much as disputed. And some other Counsel of the same Side said, that in the Case of the Town of Buckingham, where a Member of the Corporation had continued in Possession of his Office for a great Length of Time, Lord Macclesfield allowed the Party's own Oath to prove his having taken the Sacrament, and was of Opinion, that even no Proof at all was necessary. Then as to the Case of the Mayor, the Serjeant said, that his Election intirely depended upon the Validity of the Election of Boreman. For which Reason the Rule ought clearly not to be made absolute as to him, till the Election of Boreman is determined. The Chief Justice said, that where the Election of the Electors as well as the elected is recent, the Court makes both Rules absolute for these Informations at the same Time; but where the Election of the Electors has been passed for a great Number of Years, the constant Course is, that the Rule shall not be absolute against the Elected, till the Election of the Electors is first tried. And so Judge Page said, that this Point was settled in the Western Circuit in the Case of Johns and Johns; for which Reason the Court enlarged the Rule as to the Mayor. But as to Boreman they made it absolute. The Chief Justice said he did agree, that in the Case of taking the Oaths and the Sacrament, Length of Time is an Argument very material against granting these Informations upon such Exceptions; but in other Instances, where the Exception is fully sworn to and notorious, he thought the Length of Time no Objection at all against granting the Information; though it might be proper Evidence to influence a Jury.

Daniel and Purkurst.

Vide ante
214.

THIS Matter coming on again, the Court declared themselves to be of Opinion, that the Plaintiff ought to pay Costs; and that this Case was not distinguishable from the common one of setting aside a Verdict for being contrary to Evidence. Accordingly the Rule was made absolute, without Costs.

Bovey and Busby.

How for the
Ecclesiastical
Court has a
Jurisdiction
between eccle-
siastical Per-
sons in the
Case of
Slander.

THE Parties being both Clergymen, the Plaintiff libelled against the Defendant in the Ecclesiastical Court, for these Words; You are an old Rogue and a Rascal, and a contemptible Fellow, despised and hated by every body; and likewise for saying of him at another Time, You are a Liar. Mr. Filmer now moved for a Prohibition, notwithstanding the first Set of Words was laid to be spoke against the Plaintiff's Reputation. The Chief Justice doubted, whether in such Case the Ecclesiastical Courts had

had not a Jurisdiction. However a Rule was made to shew Cause; Judge Page absent.

Launce and Draper.

ON Rule to shew Cause, why a Testatum Capias into Bucks should not be quashed, for there being the 12 Pounds Costs omitted in it, which were given upon the Affirmance of the Writ of Error; though this 12 Pounds were inserted in the Capias, which was first sued out in Middlesex; Mr. Strange said, that he submitted it, this was no Variance, and that the Testatum was very regular. He said, he did agree, if the 12 l. had been inserted in the Testatum, and omitted in the first Capias, the Testatum would have been irregular; because it would have contained more Matter than was in the first Capias, and therefore not warranted by it. But as there is less Matter in the Testatum, than in the first Capias, he submitted it, the first Capias well warranted this Testatum, and more. For which Purpose, he observed, that before the Statute of 5 Geo. 1. when Writs of Error used to be quashed for their varying from the original Record, the constant Distinction was, that Writs of Error, that contained more than the original Record, were held to be bad; but those that contained less, never were. Mr. Reeves argued on the other Side, and said, he was forced to admit, that this Testatum could not be quashed on Account of the Exception for the Variance. But he insisted, that it was bad for another Reason, viz. that every Execution ought to be for the whole Sum contained in the Judgment, and such Sum cannot be divided. The Court in general agreed, that the Testatum ought not to be quashed on Account of the Variance; and the Chief Justice said, that the Distinction in Respect of Writs of Error used to be held as Mr. Strange had stated it. But they did think that the Objection, which Mr. Reeves had last made, was material. Upon which Mr. Strange said, that he had a Capias into Middlesex in his Hand, which would well warrant the Testatum, and the Court would not inquire, when it was made out. But the Court said, they took it they should inquire into it; accordingly referred the whole Matter to the Master; Judge Page absent.

How far the Court will quash a Testatum Capias, or not.

The King and Medlicoat.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not be granted against the Defendant Medlicoat, for holding a Court Leet, as Lord of a Hundred, in the Borough of Milbourn-Port; Mr. Fazakerly said, that this Borough did not send Members to Parliament, and therefore he submitted it, that such Information would not lie. Besides he observed, that the Fact was, that this Defendant only laid at the Time he was going to hold his Court, that he could hold a Court Leet as Lord of the Hundred; but that he actually

How far the Court will grant an Information in the Nature of a Quo Warranto, for holding a Court Leet without an Authority.

How far the Court will grant an Information in the Nature of a Quo Warranto, and will not drive the Party to take his Remedy by Quo Warranto only.

held it as a Court-Leet belonging to the Borough, which he had done Time out of Mind. The Court said, that they did agree, in Case a Court-Baron is held without Authority, a Quo Warranto only is the Remedy; but they always took it, when any Court-Leet is held without Authority, an Information in the Nature of a Quo Warranto is constantly allowed. However, for the other Reason that was given, the Court discharged the Rule against the Defendant; Judge Page absent.

The King *and* Davis.

When a Habeas Corpus cum causa is moved for, how far Notice is requisite to be given of the Motion.

MR. Fazakerly moved for a Habeas Corpus cum causa, to remove up an Indictment of Felony found against the Defendant in Brecknockshire, in order that it might be sent down into Herefordshire, being the next English County, that the Defendant might be there tried upon it, according to the Statute of 26 H. 8. 6. (6.) The Chief Justice said, that he doubted, whether in such Motions Notice ought not to be given to the other Side; and that though they are made on Behalf of the Prosecutor, for otherwise the Habeas Corpus may not be made Use of till the Day before the Assizes are held in Herefordshire; so that the Prisoner may be surprized, and not be able to have his Witnesses there. Mr. Fazakerly said, that he did make this Motion on Behalf of the Prosecutor; and in such Case he apprehended there was no Occasion for Notice; nor was there, as he remembered, any such Notice given in the Case of The King and Athoe. But especially in the present Case he observed, that there could be no Inconvenience; because Brecknockshire does in fact adjoin to Herefordshire. Judge Probyn said, that Herefordshire is considered as the next adjoining County to all South Wales, and Shrewsbury to all North Wales. And the Court well remembered the Case of The King and Athoe. That was an Indictment found in Herefordshire, and tried there before Mr. Justice Fortescue for a Felony committed in Wales; the Defendant was convicted upon it; but the Judge conceived a Doubt, whether he could pass Sentence upon him. Upon this the present Chief Justice, when he was Attorney General, obtained a Habeas Corpus to bring the Defendant up to the Bar, without giving Notice to the other Side; and the Defendant was brought up, and upon great Debate had Sentence of Death pronounced against him in this Court. They said it was certain, that Justices of Gaol-Delivery had a Power to try Indictments the same Assizes they are found at; and that they constantly do exercise it, unless there is some particular Reason in the Case. Accordingly in the present Case a Rule for a Habeas Corpus was granted; Judge Page absent.

Huggins and Shirley.

IN an Action for Words Mr. Agar moved for an Attachment for Non-payment of Costs of a former Notice of Trial, and that Proceedings on the second Notice might be staid, till the Costs of the former paid. The Court granted the Attachment; but said, that the latter Part of this Motion is constantly refused in all Cases, but in Executions; accordingly it was so in the present Case. Judge Page absent.

How far the Court will not stay the Proceedings in one Action till the Costs of a Notice of Trial in another are paid.

Smith and Laughton.

UPON a Writ of Error on a Judgment in the Common Pleas in a Suit by Bill against an Attorney, Mr. Marsh assigned for Error, that the Imparance was to a Day certain, but the Return of the Writ of Inquiry was at a general Return-Day, viz. Crastino Ascensionis Domini. He submitted it, that this was Error, and, as this Proceeding was by Bill, that all the Process ought to have been returnable at a Day certain. For this Purpose he cited the Case of Kirbey and Ellaston, Mich. 5 Geo. 2. That was a Suit by Bill in the Common Pleas, and the Writ of Inquiry returnable at a general Return-Day. The Defendant brought a Writ of Error relying upon this Mistake, and the Plaintiff got this amended in the Court of Common Pleas to prevent the Judgment's being reversed. Mr. Strange argued on the other Side, and said, he did agree, that this was Error at Common Law; but he submitted it, that this was only a Miscontinuance of Process. The present Case indeed is a Judgment by Default; but the Statute for the Amendment of the Law has extended the Statute of Jeofails to such Judgments, as well as others. And he did take it, that this very Exception has been over-ruled in a late Case in this Court. Mr. Parker affirmed the same. And Mr. Draper said he had a Note of such Case, which was Lebor and Hobs, Pasch 3 Geo. 2. The Note that he had taken of that Case was thus. An Action in the Common Pleas was brought by Bill; the Writ of Inquiry returnable at a general Return-Day. This was specially assigned for Error; but the Judgment affirmed. Mr. Parker said, that this was the very Case he meant; and he had the Paper-Book by him; but he believed the Judgment was not affirmed that same Term, but another. Upon which the Court ordered this Matter to stand over. Judge Page absent. Vide post.

How far an Imparance is proper to be to a Day certain, how far at a general Return-Day.

Major and —

Construction
on that Part
of the Sta-
tute of 5 Geo.
2. relating to
Bankrupts,
whereby it is
provided that
if any Person
be arrested
for a Debt
due before he
became a
Bankrupt,
such Bank-
rupt may
plead that
the Cause of
such Action
did accrue
before such
Time as he
became a
Bankrupt.

IN an Action of Debt brought upon a Judgment, Mr. Parker moved, that Proceedings might be said, by Reason that the Defendant became a Bankrupt after the Commencement of the Original Action; though he did not before the obtaining Judgment in it. He founded this Motion upon the Statute of 5 Geo. 2. relating to Bankrupts; wherein there is a Clause, that if any Person be arrested for a Debt due before he became a Bankrupt, such Bankrupt may plead, that the Cause of such Action did accrue before such Time as he became a Bankrupt, and may give that Act in Evidence. Now he observed, that the Cause of the present Action is the Judgment in the former; and therefore he did agree, that he could not plead, that the Cause of this Action accrued before the Bankruptcy. But he submitted it, that the Defendant was plainly within the Equity of that Act; and therefore he hoped the Motion should be granted. Accordingly the Court made a Rule to shew Cause.

Short and King.

How far by
the Practice
of the Court
of King's
Bench, it is
not necessary
in an Eject-
ment that
the Defen-
dant's Attor-
ney should
enter an
Appearance
for a Defen-
dant, not-
withstanding
the Suit is by
Original.

ON Motion for the Master's Report he stated the Fact to be, that this was a Proceeding by Original in Ejectment, and that the Rule, which in these Cases is entered into at a Judge's Chamber, was signed by the Defendant's Attorney; but that he had never after this appeared for the Defendant, though the Terms of the Rule require him to do it. Upon this the Plaintiff had signed his Judgment, and got into Possession; and whether this was regular or not, was the Question. Mr. Reeves and Mr. Agar argued for the Plaintiff, that the Judgment was regularly signed; and said, that the known Distinction in the Court of Common Pleas is between Suits by Original and those by Bill; that in those by Original the Defendant's Appearance must always be entered with the Filacer; though in those by Bill this is not necessary. The Terms of the Rule entered into at the Judge's Chamber require this beyond Contradiction. For which Reason, as the Defendant's Attorney omitted to enter this Appearance, they submitted it, the Plaintiff was very regular in signing his Judgment. The Master reported the Practice of this Court to be different in this respect from what it is in the Common Pleas; and that the Defendant's Attorney appearing for the Defendant was not necessary. The Court likewise held, that such Appearance was not requisite; and that, inasmuch as the Attorney had signed the Rule, they would make him confess Lease, Entry and Distress, and do all the other Matters, equally as if he had entered his Appearance. For which Reason they set the Judgment and Execution aside, and that with Costs.

Frances and Nash.

A Warrant of Attorney had been given by the present Plaintiff for entering up a Judgment against him, and there by he had agreed not to bring any Writ of Error, and that if he did, the Defendant should have Liberty to non-pros it. Notwithstanding this he did bring a Writ of Error in the Erchequer Chamber upon the Judgment so entered up. Upon which Mr. Agar moved, that the Defendant in Error might have Liberty to non-pros it at the Plaintiff's Expence; and the Court made a Rule to shew Cause.

How far the Court will give Liberty that the Defendant shall non-pros the Plaintiff's Writ of Error at the Expence of the Plaintiff, by reason of

its being brought contrary to the Plaintiff's Agreement.

The King and Harvey.

MR. Fazakerly moved to quash an Indictment founded up on the Statute of 2 W. & M. Sess. 2. 8. (11). against certain Scavengers of the Parish of St. Giles's for not paying over a certain Sum of Money to the succeeding Scavengers, which upon an Account stated before two Justices it appeared they had in their Hands. He submitted it, that this Clause in the Statute only gives the Justices Power to take the Account, and that there is no other Remedy for the Money due upon the Account, but an Action at Law; for which Reason he conceived, that no Indictment would lie. If this was so, he apprehended the Court would quash it; and that is like the Case of Indictments found at the Sessions for Perjury at Common Law. There was a great Doubt made, whether the Sessions had Jurisdiction in the Trial of such Indictments. Upon long Debate the Court held, that they had not. And now it is the constant Practice to quash such Indictments. The same is in case of Nuisances, upon an Affidavit that the Nuisance is abated. And if the Court should think it requisite to have an Affidavit that the Money is paid in this Case, he could produce such a one. Judge Page and Judge Probyn both declared, that they doubted, whether an Indictment would not lie; for which Reason (Chief Justice absent) the Motion was refused.

How far an Indictment will lie on the Statute of 2 W. & M. Sess. 2. 8. (11). relating to Highways.

The King and Langley.

THIS was an Indictment found at the Sessions for Northamptonshire against the Defendant for exercising the Trade of a Ropemaker in the Village of Easthatton, not having served a legal Apprenticeship. Mr. Abney moved to quash it, by Reason that it has been held, that this Statute only extends to Trades exercised in Cities and Boroughs, and not to Villages. For which Purpose he cited 1 Ven. 51. and 1 Mod. 26. Judge

When an Indictment is found against a Person upon the Statute of 5 Eliz. for exercising a Trade with-

out having served an Apprenticeship, how far such Indictment will not be good by Reason that the Trade was only exercised in a Village.

Page said, that he had often known these Judgments quashed upon such Exception. And he and Judge Probyn said, that they did not think this Trade was within the Statute. Though Judge Page said, it might be otherwise perhaps of a Table-maker. Accordingly a Rule was made to shew Cause. Chief Justice absent.

Sir George Caswell and Norman.

When a Writ of Error is brought and a Scire facias is sued out quare Executionem non, how far an Action may be brought of the original Judgment.

When a Writ of Error is brought and a Scire facias de Recordo is sued out, what in general relates to such Scire facias.

ON Motion for the Master's Report, the Fact was stated to be, that after a Writ of Error brought, the Defendant in Error sued out a Scire facias to assign Errors, and a Rule given to assign them by the 25th of last Month, which Scire facias was quare Executionem non. The Plaintiff in Error did not assign Errors upon that. Accordingly the Defendant sued out another Scire facias to assign Errors de Recordo the next Day, and then the Plaintiff did assign his Errors. Notwithstanding this the Defendant in Error brought Debt in the Common Pleas upon the Award of Execution here on the first Scire facias. Which, Mr. Yates submitted it, was irregular. On the other Side Mr. Parker argued, and said, that he apprehended, the Scire facias quare Executionem non is merely brought to prevent the Writ of Error's being any longer a Superseas to the Execution, if the Plaintiff in Error does not in Pursuance of it assign his Errors. Notwithstanding this Scire facias a Writ of Error still subsists, and the Judgment is liable to be reversed upon it, till another Scire facias sued out to assign Errors de Recordo; and if the Plaintiff in Error does not assign his Errors upon that, then the Writ of Error is Non-pros'd. If this was the Nature of these Scire facias's, he observed, that no Reason could be given, why the Defendant in Error should not proceed in the Common Pleas upon the Award of Execution here. And he said, that this Point was determined upon Debate in the Case of Plaxton and Gardiner, Mich. 7 Geo. 1. A Scire facias quare Executionem non was sued out, and the Plaintiff in Error pleaded Nul tiel Record; the Defendant joined Issue with him upon that; and notwithstanding that, even as the Issue too was delivered, he sued out Execution. On Motion to set this aside for Irregularity the Court refused it; and held, that upon this Scire facias the Plaintiff in Error could do nothing but assign his Errors; and, as he did not, but pleaded another Matter, the Defendant in Error was regular in taking out his Execution; though they did agree, that the Judgment might still be reversed upon this Writ of Error notwithstanding. For which Reason, he submitted it, that the Award of Execution was regular, and should not be set aside; and consequently that the Action in the Common Pleas founded upon this Award was regular likewise. Judge Page said, if this had been a Proceeding by Writ of Error quod coram vobis, a Rule might have been given the Plaintiff to have assigned his Errors, without any Scire facias at all. In the present Proceeding indeed a Scire facias is necessary; but the Plaintiff can do nothing upon it, but merely assign his Errors. He said, he took it, that two

Scire Facias's were requisite, before the Writ of Error could be got rid of; and that each of them was to be sued out for the different Purposes that have been mentioned. For which Reason he thought that the Award of Execution, and the Proceedings upon it, were clearly regular. Judge Lee said, when an Action of Debt is brought upon a Judgment in the same Court where the Writ of Error is depending, the Court constantly grants an Imparlane in that Action, till the Event of the original Judgment is determined. For which Reason he thought it proper to be farther considered, whether the Court would allow an Action to be brought upon this Award of Execution, pending the Writ of Error. Accordingly (Chief Justice absent) this matter was ordered to stand over.

Anonymus.

MR. Prat moved that the Rule might be made upon one **M**r. Allen, an Attorney of the Court, to return to **M**r. Hill all or most Part of the Money he had with him as Clerk, by Reason that a great Share of his Business was fell off; so that he had little or nothing to instruct his Clerk in. Judge Page said, the proper Rule to make in this Case was to refer this Matter to the Master to be determined by him; and if he cannot settle it, then to give Leave for an Application to the Court; and to order **M**r. Allen to attend before him de Die in Diem. Judge Lee said, that the Court made such a Rule upon a late Application of this Nature. Accordingly the Court made such a Rule in the present Case; Chief Justice absent.

What Kind of Remedy is proper to be taken, when Disputes arise between Attornies and their Clerks.

Anonymus.

MR. Parker moved for an Information against the present Sheriffs of York, for adjourning the Court of Pleas held before them for ten Days; whereas by the Custom of the Court it ought to be held de Die in Diem at the Request of a Prisoner, when he is in Custody. Accordingly a Rule was made to shew Cause; Chief Justice absent.

How far an Information shall be granted against a Judge of an inferior Court.

Paterfon and Gros.

MR. Dennison moved that Proceedings might be said in an Action of Debt brought upon an Award, by Reason that the Defendant was actually in Custody upon an Attachment for the Breach of it; and the taking that Remedy was a Waiver of this. He observed, that the Words of the Rule for granting the Attachment were, Committatur custodiae Mar' in Execution; which shews, that he is actually in Execution for the Breach of this Award upon the Attachment; and therefore the Court will not allow him to be charged with another Execution upon the same Cause of Action. And farther cited the Case of Chansey and Richardson as a Case very strong in Favour of his

How far the Court will allow an Action to be brought upon an Award, notwithstanding the Party has taken a former Remedy upon it, by way of Attachment.

his present Motion. Mr. Draper argued on the other Side, and said, that in the Case cited, an Action was first of all brought upon the Award before the Motion for the Attachment; and therefore he did agree in that Case, that the Proceeding upon the Attachment was irregular; for no better Remedy could the Party have upon the Attachment, than he could have upon an Action, which he had already taken. But in the present Case the Proceeding upon the Attachment is first of all began with; and this shall not hinder the Proceeding by way of Action, which is a greater and more beneficial Remedy; for if the Party dies in Execution, his Goods may be taken in an Execution; which cannot be upon the Attachment. He said farther, if a Defendant escapes out of Custody, he may first of all be taken in Execution again, and after that be charged with an Action for the Escape; and cited Salk. 73. in Point. The Court was of the same Opinion. Accordingly the Motion was refused; Chief Justice absent.

The King *and* The Trustees of the Kingston Turnpike.

MR. Strange moved to quash an Order of Sessions made the 4th of July last. The Order set forth, that whereas William Charleworth, Town-Clerk of Kingston, had made Complaint at the Sessions for the County of Surrey, that the Trustees had exceeded their Authority, by erecting a Turnpike in the said Town of Kingston; and whereas the Trustees had Notice given them thereof, and no Body had appeared on their Behalf; therefore on hearing Evidence in the Proof of the Charge, the Justices at their Sessions ordered, that the Sheriff should remove the Turnpike, which the Trustees had erected in the Town of Kingston, by the 24th of July following. Mr. Strange observed, that the Court had before quashed such an Order as this for want of Jurisdiction; but he allowed that since, by a Statute made in 5 Geo. 2. the Justices had an Authority given them to order the Sheriff to remove a Turnpike illegally erected. But the Exception, which he took to this Order, was, that it does not appear, the Trustees had sufficient Notice; for the Notice might have been given the Day whereon the Order was made. The Court said, they were not satisfied, that any Notice in this Case was requisite, however made a Rule to shew Cause. Vide Post.

The King *against* Barfield.

How far the Sessions has not an original Jurisdiction, but only by way of Appeal.

ON Rule to shew Cause why an Order of Sessions should not be quashed, Mr. Abney took several Exceptions to it. The Order, he said, was made upon an Appeal from the Disbursements of certain Churchwardens and Overseers of the Poor for the Year 1730. On this Appeal the Court of Sessions adjudged, that these Officers had made several Disbursements not warrantable by Law, and therefore ordered, that they should pay the Sum of 11 Pounds, being the Amount of those Disbursements,

ments, to the subsequent Churchwardens. The Exceptions taken to this Order were, first, that by the Statute of 43 Eliz. the first Application ought to have been to two Justices; but in the present Case, the Application was to the Sessions in the first Instance. Secondly, that the Appeal appear'd to have been made at a former Sessions, and no Order for the adjourning it; so that there was a Discontinuance. Thirdly, that it does not appear at what Time the first Sessions was holden, which is necessary; because by Act of Parliament, these Quarter-Sessions can be held only at particular Times. Fourthly, that the Disbursements of Churchwardens are not under the Jurisdiction of the Justices of Peace, but only the Disbursements of Overseers. Fifthly, that the Order is made upon four Persons to pay the 11 l. whereas it ought to have been specified, what Part each of the Persons ought to pay. Sixthly, that the Order requires the Money to be paid to the subsequent Overseers, not naming them, and it does not appear that there were any Overseers then in Being. Mr. Reeves pray'd a Day to answer these Exceptions. Accordingly the Rule was enlarged. *Ex relatu. Vide Post.*

Burden and Tomlyn.

THE Defendant having brought a Writ of Error returnable in Parliament, Mr. Jocelyn mov'd that the Entry, which the Plaintiff had made of a general Judgment, might be vacated, and that a special Entry might be made, that Judgment was given against the Defendant; because the Court was of Opinion, that the Plea ought to have concluded to the Country, and not with an Averment. To prove that the Court has sometimes allowed such special Entries to be made, he cited 2 Saund. 264. But the Court declared they thought the Judgment was rightly entered; for though this Court has adjudged the Plea to be ill for one particular Reason; yet if the superior Court should think it ill for another, the Judgment ought to be affirmed. And farther they said that if such special Entry should be made, they thought it would signify nothing. For the superior Court must judge upon the whole Record; and not whether the Reason given for the Judgment be a right Reason, or not. Judge Lee took Notice too, that Lord Coke observes in 4 Inst. ch. 1. Parliament, that anciently it was the Method to enter the Reasons of Judgments; but ever since Edward the Third's Time, he says, the Practice has been otherwise. Accordingly the Motion was refused. *Ex relatu. Vide Post.*

Gore and Gore.

THIS Case coming on again, Mr. Peer Williams argued against the Devise. In the Case of Scattergood and Edge he observed it is said, that thirty Years is a reasonable Time to require an executoꝝ Devise to take effect in; and no larger

Term of Years has ever been allowed. But in the present Case, there is a precedent Term of 500 Years, before the Devise can take Effect; for the Limitation to the first Son of Thomas is, from and after the Expiration of the said Term. We observed too, that for another Reason this Devise could not be good; because there are Remainders vested, which he submitted it should not be divested by executory Estates, and took a Difference between an Estate descended to an Heir and one vested by Purchase. The first he agreed might be devised, but not the latter. He said farther, that the Devise in the present Case is appointed to take Effect by way of Remainder; and therefore cannot operate as an executory one; which appears to be Lord Holt's Opinion in the Case of Goodright and Cornish, Salk. 226. and farther he cited Cro. El. 678. Lut. 798. Mr. Fazakerly argued on the other Side, and submitted it, that by the Words of the Will the Testator's Intention clearly appears to be, that the eldest Son of Thomas should take; and therefore if by any Possibility the Rules of the Law and the Testator's Intention can stand together, such Construction shall be made. And this, he said, might very well be, by construing the Will to operate as an executory Devise. The Words plainly import a future Devise; for they are to the first Son of Thomas to be begotten. It has been insisted upon that in Law the Words begotten, and to be begotten, are of one and the same Import. But though in a Limitation, where Lands are given to one and the Heirs of his Body begotten, or to be begotten, the same Estate passes; because the adding the Words begotten, or to be begotten, is merely Surplusage; yet where those Words are used to describe the Person who is to take, they certainly must have a different Signification; the one denotes a present, the other a future Gift. To this Purpose he relied on the Case of Long and Beaumont on the Equity Side of the Court of Exchequer, and that of Darbyson and Beaumont in Ejectment, in the same Court, both which were determined the 11 of Ann. and afterwards settled in the House of Lords, the same Point being in both Cases. The Devise there was to J. Pearce for 99 Years, Remainder to his first and every other Son in Tail Male, the Remainder to the Heirs male of my Aunt Elizabeth Long begotten. Elizabeth Long was then living, and had three Sons. It was determined there, that the eldest Son should take by Descent in the Life of his Mother, as Heir apparent. For the same Reason he submitted it, the Words to be begotten, must be construed as a future Devise. With regard to the Case of Scattergood and Edge, he said the Opinion of seven of the Judges against Lord Chief Justice Treby was, that if the Words of the Will in that Case had shewn, that the Testator intended a future Devise, the Devise would have been good. And for Authority he cited 1 Lev. 135. Ray. 82. Moor 847. Blanford and Blanford, 1 Rol. Ab. 612. Show. P. C. 137. Ver. 234, 304. The Court gave no Opinion this Time; but said they would take Time to consider of the Case. Ex Relatu. Vide Post.

Smith and Laughton.

THIS Case coming on again, Mr. Strange said the Point Vide ante in Question had already received a solemn Resolution in 223. the Case of The King and The Bishop of Meath, Pasch. 3 Geo. 1. That was a Quare Impedit by Original in Ireland. On Writ of Error it appeared by the Record, that the Venire was awarded returnable at a Day certain. Upon this two Questions were made; one, whether this was a Discontinuance aided by the Statute of Jeofails; the other, whether the Statute of Jeofails extended to the Civil Suits of the Crown. After a good deal of Deliberation, Lord Chief Justice Parker delivered the Resolution of the Court. With regard to the first Point they held it to be a Discontinuance, and therefore aided by the Statute of Jeofails; to which Purp. Co. Lit. 325. was cited, where a Discontinuance is described to be, the Giving an improper Day to the Party. With regard to the second Point, they were of Opinion likewise, that the Statute of Jeofails did extend to the Civil Suits of the Crown. Mr. Parker said too, that he was of Counsel with the Plaintiff in Error in the Case of Lipper and Hobbs, and upon looking into the Case of The King and The Bishop of Meath, he advised the Party to waive the Exception, and pay the Money recovered, which he did. Accordingly in the present Case the Court affirmed the Judgment. *Ex relatu.*

Williams and Brown.

IN Clement a Point was saved at the Trial by Judge Denon with respect to the Consideration of a Will, which was in the following Manner. The Devisor having two Daughters, Mehethobel and Martha, devised the Lands in Question to the Use of all and every Child and Children, Male and Female, born and to be born of the said Mehethobel and the Heirs of their Bodies, equally to be divided, and for Default of such Issue, to the Children of Martha in like Manner; the Remainder to his own right Heirs. Mehethobel had two Daughters, Mehethobel and Speed. Martha had seven Children. Mehethobel, the Daughter of Mehethobel died without Issue; and now the Question was, whether her Part should go to her Sister Speed by way of cross Remainder, or to the Children of Martha. Serjeant Hawkins argued, that there should be cross Remainders, and cited 2 Jon. 174. 2 Roll's Abr. 416. Skin. 17. 2 Jon. 72. 2 Keb. 202. 3 Keb. 788, 834. Gilbert and Writs, in 2 Roll's Rep. and 2 Cro. 655. Serjeant Chappel argued on the other Side, and cited 1 Saund. 180. Dyer 326, 330. The Court said, the Daughters of Mehethobel were plainly Tenants in Common, and they seemed to think that the Words of the Will were not sufficient to create cross Remainders. However this Matter stood over. *Ex relatu. Vide post.*

How far cross
Remainders
shall be said
to be created
by a Will, or
not.

Hooker

Hooker and Hooker.

Vide ante.
200.

THIS Matter coming on again, Serjeant Hawkins argued on the Part of the Wife, M^r. Reeves on the other Side. Serjeant Hawkins cited 11 Rep. 79. 2 Jon. 77. 2 Saund. 387. 3 Keb. 500. 2 Lev. 202. 2 Cro. 260. Ray. 28. 1 Lev. 11. 1 Roll's Abr. 677. M^r. Reeves cited 1 Roll's Abr. 677. 1 Inst. 42. 1 Ven. 206. Pol. 199. 2 Lev. 202. 2 Cro. 260. The Court declared their present Thoughts to be, that William Hooker was seised of such an Estate, as that his Wife was endowable, but said, they would consider of the Case, and deliver their Opinions in Writing to the Lord Chancellor. Ex relatu. Vide post.

Bumfeild and James.

How far the Court will require an Attorney to enter an Appearance for the Defendant, according to his Undertaking.

A Bill of Middlesex having been sued out, an Attorney subscribed on the Back of it, that he would appear for the Defendant; but since refused it; because the Defendant would not give him an Authority to appear. However on M^r. Theede's Motion the Court made a Rule upon him to shew Cause, why he should not appear according to his Undertaking. Ex relatu.

Burden and Tomlyn.

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229.

THE Judgment not being entered up completely, for that there was a Blank left for the Costs, the Master not having taxed them; M^r. Jocelyn moved, that the Defendant in Error might be obliged to complete his Judgment. M^r. Bootle, Jun. on the other Side produced an Affidavit, that the Parties had compounded the Matter by Agreement, and that the Defendant in Error had delivered up the Note, which this Action was brought upon, so that if the Judgment should be reversed, he cannot maintain another. Accordingly the Court declared, that they would not oblige the Defendant in Error to complete his Judgment. And the Chief Justice said, that he would not carry up to the House of Lords a Judgment that is not complete; so that there can be no Benefit of the Writ of Error. Ex relatu. Vide post.

The King and Rayner.

When an Information has been granted against a Person for a Libel, and a Recognizance of Bail has been given, what shall be said to be the Construction of such Recognizance.

THE Defendant had been indicted at Hicks's Hall for printing and publishing a Libel against the Government, called Robin's Game or Seven's the Main. He removed the Indictment by Certiorari into this Court, and one James Robinson and Henry

such Recognizance.

Rastall entered into a Recognizance according to the Statute of William, with Condition, that the Defendant should appear to this Indictment the first Day of last Hilary Term, that he should plead to it the same Term, and at his own Expence should either try it the same Term or the Sittings after, unless the Court should appoint another Time for the Trial; and in such Case should carry it down to Trial at the Time appointed by the Court. At the Trial on this Indictment the Defendant was convicted; which Trial was not had till the Sittings after last Michaelmas Term. This Term he was called upon his Recognizance to appear; and for not appearing a Rule was made for estreating his Recognizance. Mr. Marsh and Mr. Strange now said, that the Recognizance entered into by the Defendant's Sureties was put into the Rule for estreating the Defendant's Recognizance; whereas the Defendant himself was no Party to it; for which Reason they moved, that this Part of the Rule might be discharged. The Attorney and Solicitor General argued on the other Side, and said, that the Recognizance of the Sureties had certainly been broken; for it appears by the Record, that the Defendant did not appear till Easter Term; and in fact at the Sittings after Mich. Term the Indictment was tried at the Expence of the Crown. Besides they submitted it, that the Defendant's not appearing after Conviction was a Breach of this Recognizance; for though the usual Words in Bail Recognizances, namely, That the Defendant shall not depart the Court without Licence, be not put into these Recognizances entered into on granting Certiorari's; yet they apprehended by the Course of the Court they must be so understood; for otherwise they would signify little. The Court said it would not now be necessary to determine, what Construction these Recognizances ought to receive; for certainly the Recognizance of the Sureties ought not to be estreated on a Rule made for estreating the Defendant's. Accordingly this Part of the Rule was ordered to be struck out. But Rayner being found in the Hall, was brought into Court and committed, there being a Capias pro fine out against him. However the Court said, he might at any Time move in Arrest of Judgment before the Fine is set by the Court. Vide post.

Richardson and Martin.

Bury Assises. **I**N an Action brought by the Plaintiff, as Attorney, for a Bill of Law-charges, he produced one Witness to prove, that the Defendant approved of his Proceedings, and that, his Counsel submitted, was a sufficient Evidence of a Retainer; and produced another Witness to prove, that a Bill was delivered before the Action brought, and that, his Counsel submitted, was a sufficient Evidence of the Truth of the Items in it, without proving the several Particulars. Serjeant Urlyn objected to the contrary. But Mr. Justice Page, who tried the Cause, was of Opinion for the Plaintiff in both Points.

When an Action is brought by an Attorney on a Bill of Law-charges, what shall be laid to be a sufficient Evidence in such Action.

Harvey *and* Syliard & Ux'.

How far an
Action of
Trover will
not lie a-
gainst a Ser-
vant, but on-
ly against the
Master.

Bury Assizes. **I**N Trover brought against the Defendant in the Right of his Wife for a Box with 80 Pounds in it, which was delivered to her as Book-keeper to her Brother, who was a Carrier, in order to be sent by the Wagon to London; which 80 Pounds was afterwards lost; Mr. Pillsworth objected, that the Action would not lie against her; but that it ought to have been brought against the Brother himself. Serjeant Urlin submitted it, that it would, in as much as it was founded upon a Tort. However, the Judge was of a contrary Opinion; accordingly the Plaintiff was nonsuited.

Term. Pasch.

6 Geo. II. 1733.

Anonymus.

MR. Fazakerly moved for a Mandamus to be directed to one of the Bailiffs of the Town of Carne, requiring him to produce the publick Books of the Corporation at the next Assembly of the Corporation, in order that an Entry may be made in them of the Election of a new Member. He said he had an Affidavit to produce, that this Bailiff refused to produce them at the last Assembly; and therefore submitted it, his Motion was now regular. Judge Probyn said, that he did not see but the Corporation might make a new Book to enter their Aas in; and that such Entry would be as valid, as in the Old ones. However Judge Page said, in the Case of The Corporation of Esham such Entry was made in a new Book, and that Book produced as Evidence at a Trial at Bar; but the Court refused that Evidence, and the Corporation was nonsuited. He said Mr. Reeves and he were Counsel in that Cause; but he did own, that if such Case should come before him, he should be of a different Opinion; and so Judge Probyn declared likewise. Judge Lee said, that he took it, the Court would by no Means grant such a Motion as this, without an Affidavit of the Fact, that the Officer had been guilty of some Default of this Sort before. And he said he remembered, when Mandamus's were first moved for upon the Statute of Anne, to go to the Election of a Mayor, an Affidavit was always produced; though of late this has been omitted. For this Reason he thought it necessary that the other Side should have Liberty given them to shew Cause. Accordingly the Court made a Rule, that the Mandamus should go, unless Cause to Morrow. The next Day Mr. Strange came to shew Cause; but the Court made the Rule absolute.

When a Person has the Custody of the publick Books of a Corporation, how far a Mandamus will lie in order to require him to produce them at a Corporate Assembly.

Anony.

Anonymus.

How far the Court will set aside a Plea in Bar, by Reason of its being frivolous.

IN Debt on Judgment the Defendant pleaded Nil debet; and Motion was made to set this Plea aside, as being a frivolous one. Judge Page said this was a Plea in Bar; however made a Rule to shew Cause. Vide post.

Anonymus.

How far the Court will give Liberty, or not, that a Declaration may be amended in respect of the Damages laid in it.

MR. Theede moved for Liberty to amend his Declaration by altering the Damages from 200 l. to 2000 l. Judge Page said this would be to make a new Action; and Judge Probyn doubted; however the Court made a Rule to shew Cause.

Anonymus.

When a Mandamus is granted in order to require a Corporation to go to an Election, how far it is necessary, or not, that the Mandamus should specify the Time when the Election is to be.

A Mandamus had been granted a few Days ago, to go to an Election of an Officer of the Corporation of Esham in the County of Worcester, upon an Affidavit, that there was a Vacancy, and that the Corporation had not filled it the last Charter-Day appointed for that Purpose. Mr. Wills came now and prayed, that that might be superseded, unless a Day be appointed in the Writ, when the Election is to be. By the Usage in this Borough, he said, the Notice to be given of Corporate Assemblies need not be above Twenty-four Hours. He produced an Affidavit, that one of the Members of the Corporation was a Member of Parliament for the Borough, and by Reason of that was now obliged to attend in Parliament; so that it would be impossible for him to attend upon such short Notice. And besides, he said, in all Cases it would be greatly expedient, that a Day should be appointed in the Writ to prevent Surprize to the Parties. Mr. Fazakerly on the same Side said, that he did own, a good Deal of Pains had been taken to find Precedents of Mandamuses at Common Law, wherein a Day for the Meeting of the Corporation is appointed, and that they had met with little Success. (Mr. Draper said there was one in the Case of the Corporation of Plymouth; but that appeared to be by Consent.) However, he said it appears from every Day's Experience, that these Writs are always moved for in open Court, and can never be had but in Term-Time. He observed, that a Rule for a Mandamus's Issuing is so necessary, that the Mandamus by the Practice of the Court must bear Teste the very Day the Rule is made. For this he appealed to Mr. Masterman, who assented to the same. This, he conceived, shew'd that these Writs were in the Breast and Discretion of the Court; and therefore they might very well supersede them, when they are granted, or refuse to grant them when they are applied for; unless the Party applying for them, will consent to

to do what is reasonable; that is, in the present Case, will consent to appoint a Day. In Cases of Attachment for Non-payment of Costs, or disobeying a Rule of Court, which are Writs, that do not issue but upon Motion, and are in this respect upon the same Footing with Writs of Mandamus, if the Party offers to pay the Money immediately, or otherwise to clear the Contempt; the Court constantly lays their Hand upon the Writ, and orders it to lie in the Master's Hand for a few Days. The Counsel of the other Side declared, they had no Authority to consent; and thereupon the Opinion of the Court was taken; which was, that a Mandamus cannot issue but upon Motion; but they thought it a Motion of Course, and declared, that a Mandamus was a Writ which the Party is intitled to de jure. Judge Probyn said, then an Attachment is for a Contempt of the Court; and therefore he thought that Writ to be in the Breast and Discretion of the Court. Accordingly the Motion was refused. Vide post.

Anonymus.

MR. Varney moved for an Information against Mr. Fowle, who was Deputy Recorder of the Town of for acting as Justice of Peace there for about seven Years together. He said he did agree, that by the Charter the Recorder himself is appointed to be one of the Justices; but he submitted it, that though a Deputy has all the Privileges which the Principal himself has, belonging to the Nature of his Office; yet such collateral Privileges as these, he submitted it, he has not. He said he did own the Recorder himself was now dead, and that therefore now Mr. Fowle does not take upon him to act as Justice of Peace; for which Reason he did not pray an Information in the Nature of a Quo Warranto, but a common Information only. Accordingly a Rule was made to shew Cause.

How far a Deputy has not in him the Power of his Principal.

Harcourt and Seagrave.

MR. Strange came now to shew Cause, and submitted it, as this was a Plea in Bar, the Court would by no Means set it aside upon Motion. Mr. Bootle Jun. on the other Side said, that as the Circumstances of this Case were he submitted it they would. The Defendant first of all demurred to the Declaration. The Plaintiff joined in Demurrer; the Paper Book was made up, and delivered to the Defendant; the Defendant writ on the Back of it, that he withdrew his Demurrer; and pleaded Nil debet. By the Rules of the Court, he said, a Defendant cannot withdraw his Demurrer, but on pleading the general Issue. And Nil debet is by no Means the general Issue in Debt on Judgment, but a bad Plea, which the Plaintiff might clearly take Benefit of upon a Demurrer. Judge Page said, that Nil debet is the general Issue in some Actions; and if the Defendant had pleaded Not guilty, he did

Vide ante

not see but it must have stood. Accordingly the Rule was discharged.

Anonymus.

How far Words which charge a Person with Lewdness, are Actionable or not.

IN an Action for Words, where there were several Counts and Intire Damages, Mr. Top moved in Arrest of Judgment, that one Set of Words was not Actionable. They were these. We caught the old Fox in an unlawful Room with Frances's Wife, and he would have lain with her. And the Court made a Rule to shew Cause. Vide post.

Anonymus.

How far a Notice of Trial shall be said to be sufficient or not.

MR. Draper moved to set aside a Verdict, where there was no Defence, for the Notice of Trial being too short, as the Circumstances of this Case were. He did agree, that the Notice was given the 27th of February, and that the Commission Day was the 7th of March, and therefore there were the eight Days which are generally given. But he said the Defendant's Witnesses lived 125 Miles from the Place where the Assizes were held; so that it was impossible for him to have them there at the Trial. However the Motion was refused.

Doyly and Burow.

How far a Writ of Inquiry may be returnable at a general Return Day notwithstanding the Suit is by Bill.

UPON a Writ of Error in an Action brought against an Attorney in the Court of Common Pleas by Bill, Mr. Parker assigned for Error, that the Writ of Inquiry was returnable at a general Return Day, whereas it ought to have been a Day certain. He did agree, that in the Case of Smith and Laughton, there was an Exception taken, which appeared to be something like this; but upon comparing the two Cases together, he apprehended they were distinguishable. For there the Imparance was right, to a Day certain, and therefore that Defect in the Writ of Inquiry could only be a Discontinuance. But in the present Case, he submitted it, there was a Misawarding of Process; and no Defect of that Sort is helped by the Statute of Jeofails. However the Court thought the two Cases to be the same; accordingly affirmed the Judgment.

The King and Taylor.

What is the proper Judgment to be given in an Information in the Nature of a Quo Warranto.

IN an Information brought against the Defendant in the Nature of a Quo Warranto, for exercising the Office of Capital Burgess in the Borough of Esham, from the 20th of August last, the Defendant pleaded that true indeed it was, that from the 20th of August to the 29th of September he had not proper Authority to act in that Office; and accordingly for that put himself

himself into the King's Mercy; but for the rest of the Time he justified. Several Issues were joined upon the several Parts of the Justification; and for those a special Verdict found. The last Vacation, Judgment was entered against the Defendant, for so far as he had confessed. But Mr. Wills submitted it, that that Judgment was entered up in a wrong Manner; and therefore prayed it might be reversed. For a Judgment of Ouster was entered up against him; whereas there ought only to have been a Fine set upon him for his Usurpation for that Time, and a Capias pro fine awarded. The Court thought it might be proper to examine into the whole Record; and therefore ordered that they should be attended with Copies of it; and farther made a Rule to shew Cause. Vide Post.

Anonymus.

MR. Prime moved, that the Irregularity of a Judgment might be referred to the Master. He said this was an Action of Assumpsit, and the Defendant pleaded Non Assumpsit infra sex annos ante exhibitionem Billæ. The Plaintiff replied, that he sued out a Latitat on such a Day, and so continues it down to the Time of exhibiting the Bill, and avers that the Defendant did assume within six Years before the suing out such Latitat. To this the Defendant rejoined, that he did not assume within six Years before the suing out such Latitat, and so concludes to the Country. This Rejoinder, he said, was put in in Time; but notwithstanding, the Plaintiff had signed his Judgment. Mr. Parker on the other Side said that he did agree the Fact was as Mr. Prime had stated it; but the Rejoinder was not signed by a Counsel's Hand, which he apprehended it ought to have been, though it was a common Rejoinder only, and concluded to the Country; in as much as it was a Rejoinder to a special Replication. The Court said this might be proper to be considered of upon the Master's Report; but at present they must refer it to them; which accordingly they did. Vide Post.

When a Rejoinder is put into a special Replication, how far the Rejoinder must be under the Hand of Counsel.

The King and Jones.

ON Rule to shew Cause, why a Mandamus should not be directed to the Defendant, a Justice of Peace, to levy the Penalty of 104 Pounds upon a Scavenger, in Pursuance of a Conviction made by him on the Statute 2 W. & M. S. 2. 8. (5) Mr. Abney said, that he did agree it was sworn by the Affidavit, on which the Rule was made, that the Justice, after hearing the Evidence on both Sides, did say to the Scavenger, you are guilty, you are to forfeit the Penalty, and directed the Attorney, who appeared for the Prosecutor, to draw a Warrant for levying the Penalty, and yet that he had not executed that Warrant, nor any other for that Purpose. But still he submitted it, that the Rule for the Mandamus issuing ought to be discharged. He said he had an Affidavit to produce, that the Default of the Scavenger charged by the Information, before the Justice, was that

How far a Justice of Peace shall not be said to have made a Conviction.

that he omitted doing his Duty according to the Clause of the Act that has been mentioned, from such a Time to such a Time, which was fifty-two Defaults in all, successively, except on Sundays and Holidays. The Warrant drawn by the Attorney was to levy the Intire Sum of 104 Pounds, which came to so much by computing each of the fifty-two Defaults at 40 Shillings a Forfeiture. When this Warrant was produced before the Justice, the Justice told the Attorney, that to his Knowledge the Prosecutor was absent out of the Parish for some Part of the Time, in which he had sworn the Scavenger was guilty of this Default, according to the Clause of the Act, that has been mentioned; and therefore for that Time he could not convict him, but offered to convict him for such of the particular Defaults within that Time, as the Prosecutor could particularly and positively swear to. Upon this State of the Fact, Mr. Abney submitted it, that what the Justice said upon hearing the Evidence by no Means amounted to a Conviction; to make it one, that it ought to be under Hand and Seal; and therefore instead of moving for a Mandamus to levy the Penalty in Pursuance of the Conviction, the Motion ought to have been for a Mandamus to make a Conviction. Mr. Strange argued on the other Side, and said, that by every Day's Experience it appears, when Certiorari's go down to remove Convictions, the formal Part of it is afterwards drawn up and settled by Counsel, and then the Justice's Hand and Seal is put to it; but yet it was never doubted but the Judgment pronounced by the Justices was the Conviction. In the present Case the Justice did pronounce such Judgment; and therefore it was very extraordinary to say that this was not a Conviction. By their Affidavits, he submitted it, it appeared to be one; and therefore if the Affidavits of the other Side contradicted it, the Court will not determine which Affidavit is true upon a Motion; but will require the Fact to be returned upon the Writ of Mandamus. Judge Page said, if the Affidavits on one Side directly contradicted the Affidavits of the other, he did agree the Court would require the Fact to be returned upon the Mandamus, in order that the Party may bring an Action for a false Return, and so have the whole Fact tried before a Jury. But in the present Case, the Affidavits on one Side only are, that the Justice declared that the Scavenger was guilty, and that he must pay the Penalty; which are not inconsistent with the Affidavits of the other Side, which explain the Meaning of those general Expressions; and by that Explanation it is admitted, that the Justice did say the Scavenger was guilty, and he must pay the Penalty; but it is sworn, that the Justice did not say how far he was guilty, and how much he must pay for the Penalty; so that it appears the Conviction was not compleat. For these Reasons the Rule for the present Mandamus was discharged; and afterwards Mr. Strange moved for another Mandamus, to require the Justice to make a Conviction; which the Court accordingly granted.

Anonymus.

MR. Hayward moved for an Information against a Justice of Peace for making an Order of Bastardy upon one Fitzgerald, without giving him a Summons to attend. Judge Lee said he thought it had been determined upon Debate, that a Summons in these Cases is not necessary; because, if the Party was summoned, it was likely that he would run away. Mr. Strange said he believed he remembered the Case Judge Lee referred to; but upon his Memory, all that was determined in that Case was, that it need not appear upon the Face of the Order of Bastardy, that the Party was summoned. And Mr. Hayward said the Justice might issue his Warrant to bring the Party before him in the first Instance; and by that all the Danger of his running away would be prevented. However upon the Court's conceiving a Doubt, whether that Case was not determined as Judge Lee mentioned, they made no Rule at present; but gave Mr. Hayward Liberty to move this Matter again. *Vide Postea.*

How far it is necessary, or not, that a Person should be summoned before an Order of Bastardy can be made upon him.

The King and Tremineer.

ON Rule to shew Cause why an Information should not go against the Defendant, late Mayor of the Town of Helston in the County of Cornwall, for his demanding more Toll in the Market than was due, for his obstructing a Farmer to come into this Market, because he would not pay that Toll, and for his beating him, when he was in it on the same Account, and this whilst he was in the Execution of that Office. Mr. Fortescue said, that this very Point concerning the Quantum of the Toll, was tried this last Assizes, in an Assumpsit brought by the Lessees of the Toll, and a Verdict found in Favour of the Corporation; for which Reason he submitted it, this Rule should now be discharged; which the Court accordingly did. And Judge Page said he remembered Lord Chief Justice Holt would never try a Title to a Man's Estate in an Indictment of Trespass.

Vide ante

Catherol and Cowper.

IN an Action of False Imprisonment tried before the late Lord Raymond, a Verdict was found for the Plaintiff, subject to the Opinion of the Court upon a Case. The Counsel on both Sides differed concerning the State of the Case. Mr. Kettleby moved now for the Postea to be delivered; unless the Court should be of Opinion, that a Case could some way be settled by the Notes that Lord Raymond took at the Trial. The Court declared their Opinions, that unless the Counsel could agree upon the Case amongst themselves, the Fact must be tried over again in another Action. Accordingly the Motion was refused.

When a Case is intended to be made for the Opinion of the Court, and the Judge dies before the Case is settled, how far the Case cannot afterwards be settled in any other way, than by Agreement of the Counsel.

The King *and* Lynn.

How far the Court will grant an Information for a notorious Offence, notwithstanding the Facts are totally denied.

ON Rule to shew Cause, why an Information should not be granted against the Defendants for forcing one Elizabeth Mortimer to marry one of the Defendants against her Will. Serjeant Birch said, that he had Affidavits to produce, which directly contradicted every one of the Facts charged by the Affidavits, on which the Rule was made. Judge Page said, that that was no Reason, why the Court should not make the Rule absolute, in order that so gross a Crime might be examined into. And so he remembered the Court was of the same Opinion in the Case of one Fazar, a Coachmaker's Wife, who was the chief Instrument in a Villany of the like Nature. Accordingly in the present Case the Rule was made absolute.

Austin *and* Gervas.

How far the Court will grant a Prohibition, or not, to stay a Suit in the Ecclesiastical Court, relating to a Parish Clerk.

UPON a Dispute between the Plaintiff and Defendant concerning which of them was elected into the Office of Parish Clerk, the Defendant entered a Caveat against the Plaintiff to prevent his being sworn in; the Plaintiff instituted a Suit in the Ecclesiastical Court to take off this Caveat, and prayed there, that he might be admitted. Upon this the Ecclesiastical Court inquired into the whole Affair; but in the End admitted Gervas, decreed against the Plaintiff, and condemn'd him in Expences. For this the Plaintiff obtained a Rule to shew Cause, why a Prohibition should not go to the Ecclesiastical Courts, on account of their having no Jurisdiction to examine into a Matter of this Nature, it concerning a Right to a Temporal Office. Mr. Fazakerly came now to shew Cause against this Rule; and said, in the first place he submitted it, that the Ecclesiastical Court had a Jurisdiction; but admitting that they had not, that yet the Plaintiff could not move for a Prohibition to stay Proceedings in a Suit which he himself had instituted. Besides, he said, he apprehended that Gervas had a Right to be admitted, and the Ecclesiastical Court could not refuse it him; and so he said the Court was of Opinion in one Case, where a Mandamus went to admit a Churchwarden, that the Ecclesiastical Judge was Ministerial in this Respect, that he was bound to admit the Party, who applied for the Mandamus, and that he could make no Return to excuse himself from doing it. Mr. Strange argued on the other Side, and said, that he did agree the Office of Parish Clerk was exercised about Spiritual Matters; but yet the Office itself was Temporal; for which Reason he apprehended the Ecclesiastical Court had no Jurisdiction concerning it; and for this Purpose cited 2 Roll's Abr. 285. in the Case of a Register. If this then was so, he said it would be no Objection that the Plaintiff himself had begun this Suit in the Court below; and of that Opinion he observed the Court was in the Case of

of Dr. Wilmer. The Court declared themselves to be of the same Opinion in the present Case; and as to what was mentioned concerning the Mandamus, they did agree there was one Case to that Purpose: but all the Cases since have been against it; and now they said it was settled, that the Ecclesiastical Judge may return upon the Mandamus, that the Party was not elected. Upon this Mr. Fazakerly proposed, that the Ecclesiastical Judge should admit Austin, as well as he had admitted Gervas; and that the Parties should try the Merits of their Election in a feigned Issue; which Proposal was accordingly agreed to.

Jones and Amys.

IN Debt on Judgment brought by an Administrator, Nul tiel Record was pleaded. The Record was proved. But now a Motion was made in Arrest of Judgment, that the Plaintiff has declared under Letters of Administration granted by the Bishop of Exeter; whereas it appears by the very Judgment in this Court, which the Action now is founded upon, that the Intestate had bona notabilia; for that very Judgment makes it so. For which Reason the Administration was void; in as much as it ought to have been granted by the Metropolitan. Accordingly a Rule was made to shew Cause. *Vide postea.*

When an Action is brought by an Administrator, how far the Court will arrest the Judgment, or not, by Reason of the want of Jurisdiction in the Person granting the Administration.

Hall and Traverse.

IN an Action for Words, where there were several Counts, and intire Damages, Mr. Top moved in Arrest of Judgment for that the Words in one of the Counts were not Actionable, which were these following. *Palmer Hall* does lie with other Men's Wives, and gets them with Child, like a Rogue as he is; and he would have lain with my Wife; but he was prevented by our coming into the Room, *Innuendo* the Defendant and another. Accordingly a Rule was made to shew Cause.

Vide antea

Cock against Sir Francis Vivyon and others.

IN an Indebitatus Assumpsit, wherein there were eight Counts, and intire Damages, Mr. Robinson moved in Arrest of Judgment. In the four first Counts, he said, the Plaintiff has declared, that he was possessed of a Market in the Town of Helston in the County of Cornwall, and of a Market-house there for setting down Corn in, that comes to be sold in the Market, and in Consideration that he permitted the Defendants to bring their Corn into the Market, and put it down into the Market-house, the Defendants promised to pay a certain Sum of Money for Picage and Stallage, being the ancient customary Sum for that Purpose; and those four Counts, he did agree, were right. But in the three next

How far an Indebitatus Assumpsit will lie for Toll or not.

Counts

Counts the Plaintiff sets forth the same Consideration as in the first; but then lays the Promise to pay a certain Quantity of Coll in Corn, specifying the Quantity, being the antient customary Coll for that Purpose. And in the last Count he sets forth the same Consideration; but then lays the Promise to pay as much Corn for Coll, in exposing the said Corn in the Market, as the Plaintiff should deserve, according to the Custom aforesaid. To these four last Counts he took several Exceptions. To the three first of them, he said, he apprehended that an Indebitatus Assumpsit would lie for nothing but Money; and for Coll in Specie he submitted it, the only Remedy was a Distress. Besides, he conceived that Coll was due from the Buyer only, and not from the Seller. To the last of them he said, he conceived that a Quantum Meruit likewise would lie only for a Sum of Money, and not for an uncertain Quantity of Goods in Specie. For which Reason he apprehended that the Judgment ought to be arrested. Judge Lee said that these Actions of Indebitatus Assumpsit had of late Years been carried much farther, than they were formerly. It is certain now, he said, that this Action will lie for Scavage, for a Fine due to the Lord from his Copyholder; and if the Corn is the Duty, he saw no Reason, why it should not lie for that likewise. The Court in general inclined to think that notwithstanding the Exceptions the Plaintiff ought to have Judgment. However gave the Defendant Liberty to consider of this Matter a little longer, and to move them again, if he thought proper. Vide postea. 304.

The King and Amys.

How far that Part of the Statute of 3 Eliz. which gives Justices of Peace a Power to discharge Apprentices, extends to no other Trades than those which are mentioned in the very Words of it.

MR. Strange moved to quash an Order of Sessions for discharging one Scannard from an Apprenticeship of a Carpenter, which he was bound to. He observed, that the Trade of a Carpenter is not within the Words of that Part of the Statute of 3 Elizabeth, which gives Justices of Peace Power to discharge Apprentices; and this Part of the Statute has never been extended to any other Trades, than those that are expressly mentioned by the very Words of it; though he did agree, that the other Part of the Statute concerning Persons being bound to serve Apprenticeship has been extended farther. For this Purpose he cited Salk. 471. And accordingly the Court made a Rule to shew Cause. Vide postea.

The King and Pickley.

How far a Person can be indicted for a Cheat.

ON Rule to shew Cause, why an Indictment should not be quashed, M^r. Draper said, that the Indictment charged the Defendant with selling a Sack of Wheat containing so many Bushels, as he falsely asserted, whereas the Sack Plurimum deficiebat de legali Mensura. To this Indictment he said there had been three Exceptions; First, that this is only a private Cheat;

Sec.

Secondly, that though it be an Offence by the Statute of 22 & 23 Car. 2. 12, yet it is not so at Common Law. Thirdly, that the *Plurimum deficiebat* is too uncertain. To the first he observed, that Cheating by false Tokens was certainly indictable at Common Law; and he submitted it, that the Sack in this Case was a false Token. To the second he cited *Sid. 409*. And to the last, he apprehended the Indictment was certain enough. Besides, he said, supposing this Indictment could not be maintained upon a Demurrer, yet the Court will not quash it; and for this Purpose cited the Case of *The Queen and Orbel*, *Mod. Cases 42*. Mr. Parker argued on the other Side, and said he conceived that the Sack could by no Means be a false Token in this Case; for it is not the proper Measure appointed by the Law to sell Corn by. He observed, that there was a Case very much like the present one, which was tried before Lord Raymond at the Sittings the 4th of Geo. 2. the Name of it was *The King and Nicholson*. That Indictment set forth, that every Chaldron of Coals sold in London ought to contain 36 Bushels, and that another contracted with the Defendant for six Chaldrons; but that every one of the six Chaldrons delivered in by the Defendant wanted a certain Quantity in Measure. Mr. Fazakerly was of Counsel there for the Defendant; and he objected, that this was not an Offence indictable. Lord Raymond in that Case was of the same Opinion; and directed the Jury to acquit the Defendant. Mr. Parker farther cited to the same Purpose 1 *Mod. 71. 288.* and that of *The King and Bryan*. Then as to the Exception for the Uncertainty of the Indictment, he cited 2 *Roll. Ab. 80. Placito 13. Cr. 1. 380. Cr. 2. 324.* and *Salk. 687.* And in Answer to what was objected, that the Court would not quash this Indictment, he observed, if this was no Offence indictable at all, the Court certainly would quash it; and for this Purpose cited *Salk. 379.* and *Mod. 5. 18.* The Court in general agreed, that Cheating by false Tokens is an Offence indictable by the Common Law; and Judge Probyn said, if the Defendant had been indicted for selling by a false Bushel, such Indictment would have been good at Common Law. But in the present Case the Court was of Opinion, that the Fact charged upon the Defendant was by no Means indictable at Common Law. And Judge Page likened it to the Case of a Tradesman's telling his Chap, there are so many Ells in such a Piece of Cloth; the Buyer may easily measure the Cloth, and see whether there are so many; and if he will not, it is his own Folly. Accordingly the Rule was made absolute.

Burden and Tomlyn.

MR. Jocelyn came now and produced a Rule of Court made ^{Vide ante 37,} in this Cause last Michaelmas Term, whereby the Court ^{229.} ordered, that Judgment should be for the Plaintiff; Judgment he said had not been entered in Pursuance of that Rule; and therefore he moved now, that in Pursuance of that Rule the Court would make another Rule, that Judgment should be entered. The Court declared it to be a settled Rule, that the Party

must always give Notice of his Motion, where he moves upon a Rule of Court, in order that they may be informed by the other Side, whether there have not been other Rules in the Cause made contrary and subsequent to that Rule. For which Reason, as no such Notice had been given in this Case, the Court refused to make any Rule at present. Vide Post.

Lethely and Cowper.

How far a Declaration may be allowed to vary from the Writ.

IN an Action brought upon a Recognizance of Bail, Mr. Fazakerly a few Days ago obtained a Rule to shew Cause why the Proceedings should not be stayed, by Reason that some short Time before the Declaration served in this Action, the Plaintiff's Attorney writ to the Defendant, who was one of the Bail, to tell him, that he should be obliged soon to take out a Writ against him, at the Plaintiff's Suit, for Words; accordingly soon after he did serve him with a Writ of Trespass at the Plaintiff's Suit; but after this declares against him upon this Recognizance. Mr. Fazakerly at that Time said, that this was a meer Surprize upon the Bail, and by this Means he was prevented from surrendering the Principal in Time, which otherwise he should have done. Mr. Fazakerly now moved, that that Rule might be made absolute. Mr. Strange said he was ready to shew Cause; and the Cause he shewed was, that the Plaintiff's Attorney writ the Defendant Word, that he should sue out a Writ of Trespass against him at the Plaintiff's Suit generally, without saying for what Cause. For which Reason, as the Defendant had not annexed the Letter to his Affidavit, to ascertain whose Oath was true; he submitted it, the Rule should be discharged. Mr. Fazakerly then said, that admitting this should be thought to be a sufficient Answer, he had another Objection to make to these Proceedings, which he apprehended would be fatal. By the Rule of the Court, where the Proceeding is by Action brought upon the Recognizance, the Bail has eight Days to surrender the Principal, after the Return of the Writ. The Intention of this Rule is, that the Bail may have timely Notice to discharge themselves; for which Reason he apprehended that this Writ ought to have been in Debt, and not in Trespass. And for this Purpose he cited a Case by the Name of Dupleger and Myat. Mr. Strange argued on the other Side and said, that by the Course of the Court, you cannot take out a Writ with an *Ac etiam* in a Suit by original upon a Recognizance; for which Reason the Bail cannot have that exact Notice which was contended for. In these Cases he said, the constant Method of Proceeding is only to take out a Process against the Party, to bring him into Court; and then you declare against him, as you do in other Cases. But he observed farther, that he this Answer thought sufficient, or not, the Rule for shewing Cause must be discharged, by Reason that the Rule was obtained singly upon the first Objection. Accordingly the Court did discharge that Rule; but made another, that this Matter of Pleading should be referred to the Master, and gave the Party Liberty to produce this Letter before the Master, in

order that the whole of the Fact may come before the Court upon his Report.

The King and The Inhabitants of Woodsterton.

ON Rule to shew Cause, why some Orders should not be quashed, which were made by two Justices of Peace upon one Nicholas Baker, Overseer of the Parish of Woodsterton, for the paying the Sum of 15 l. to one Simon Weston for his Bill in Surgery upon one Joseph Colleson, a poor Inhabitant of that Parish, and likewise for the paying another Sum to the Wife of Richard Ryley for her Attendance in Nursing this poor Man in his Illness. Mr. Parker said, that there had been several Exceptions taken to the Form of this Order, and likewise to the Substance. To the Exceptions in Point of Form, he said, he would first of all give an Answer. The first of them was, that the Order does not conclude, Given under our Hands and Seals; but, he observed, that in the Beginning of the Order it was said, We, two of his Majesty's Justices of the Peace, whose Hands and Seals are hereunto set; which he apprehended was sufficient. The Second was, that the Statute of 2 & 4 W. II. (11.) does not give Authority to any Neighbouring Justices to make such Order, but only in such Cases, where there is none dwelling within the Parish; and in the present Order it did not appear, but there might be Justices dwelling within the Parish. In Answer to this Objection, he said the Court would not intend that there were Justices dwelling within it; and for this Purpose cited Hob. 78. and besides, he observed, that the Act was only directory in this Respect; and for that relied upon Salk. 473. The Third was, that the Overseer does not appear to have been summoned; whereas the Statute of 9 Geo. I. requires that no such Order shall be made without such Summons. To this he answered, that the Court will intend the Party was summoned, and for this Purpose cited the Case of The King and Venables, Trin. 11 Geo. I. There the Defendant was convicted upon the Statute of 5 & 6 Edw. 6. for keeping a disorderly Alehouse. Exception was taken to that Conviction, that it did not appear he was summoned; but that Exception was over-ruled. So likewise was it over-ruled in two other Cases of The King and Holland, Trin. 5 Geo. 2. and The King and Drake, Mich. 7 Geo. I. which were Orders of Bastardy. The last Exception in Point of Form was, that the Statute of 9 Geo. I. requires, that no such Order of Relief shall be made but upon Oath of some Matter, which the Justice shall judge to be a Reasonable Cause for giving the Relief. The Answer which he gave to this Exception was the same with that he gave to the former, viz. that it shall be intended. Mr. Wirley argued on the other Side, and to the first Answer that was given to the first Exception, submitted it, that what was in the Body of the Order was only by way of Recital. To the Answer to the second he said, the Words of the Act were, If no Justice be dwelling in the Parish; which he apprehended was a positive Declaration, that if there was a Justice dwelling there, he only should determine the

Vide ante
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the Matter. Then as to the Want of Summons, which was the third Objection, he conceived the Words of the Statute of 9 Geo. were penned so strong, that the Justices had not even a Jurisdiction without it; and every Point of Jurisdiction, he submitted it, must be fully set out, and the Court will make no Intendments in Favour of it. The same Observation he made to the last Objection in Respect of the Oath; and for this Purpose cited Carth. 365. In that Case it is expressly resolved, that in Orders of Removal it must be averred that the Complaint was made by the Churchwardens and Overseers, and by the same Reason he apprehended, that the present Order should have appeared to have been made upon Oath. Mr. Fazakerly was of the same Side with Mr. Wirley, and as to this Exception in particular, concerning the Oath, he did apprehend, there was a good deal of Weight in it. He did agree that in Orders of Removal made upon the 13th and 14th of Car. 2. this is not requisite, and so he did agree, it had often been determined; but the Reason was, that that Statute does not require an Oath; but the present Statute of 9 Geo. does require it in the most positive Terms, and upon the same way of reasoning he urged the Exceptions of the Want of Summons, and the other Requisites by that Act. Then as to the Substance of this Order, he submitted it, it was clearly fatal. The Meaning of the Statute of 3 & 4 W. he said, was nothing more than that the Justices of Peace should have a Power to order Parish-Officers to relieve a poor Inhabitant, where it was fit he ought to be relieved. But in the present Case the Parish-Officers have actually given the Party Relief; they employed a Surgeon and a Nurse to take Care of him. The Surgeon and Nurse have a proper Remedy by way of Action against the Officers; and the Justices have no Pretence to interfere in this Matter. So he said this Point was ruled in the Case of The Queen and The Inhabitants of Belcham, Trin. 7 Ann. and oftentimes it has been so in this Court. As to all the Exceptions for want of Form in these Orders, the Court declared they thought they were answered; and as to the principal of them upon the Statute of 9 Geo. 1. they took it these were only Matters of Direction concerning the Proceeding of the Justices, and not concerning their Jurisdiction. But as to the Exception in Point of Substance in the Order, they thought it must be fatal. Upon this Mr. Parker took an Exception to the Certiorari, that it had not rightly described the Orders; for in the Certiorari they are described to be made upon one Nicholas Barker, whereas the Orders removed appear to have been made upon Nicholas Baker; so in the Certiorari one of the Orders is described to be made for Payment of a Bill to one Simon Weston Surgeon, whereas in the Order removed he is described by the Name of Simon Weston generally, without an Addition. In the Case of a Writ of Error, he said, it was known, if the Party has an Addition, which he has not in the Record below, the Writ of Error is defective. Accordingly the Court made a Rule for quashing the Certiorari. Vide Post.

The King and Mather.

ON Rule to shew Cause why an Information should not go against the Defendant for a Misdemeanor; the Fact appeared to be in the Manner following. M^r. Bingley, an Alderman of the City of Chester, came before the Court of Sessions, which was held there the 27th of May last by Adjournment from the 29th of November before, and gave Information upon Oath, that Mary Mackdonnel, who attended there by his Order without any Warrant, was the Evening before walking with two other Women on the Outside of the City, he was returning into the City on Horse-back; and as soon as he came near the Women, one of them cried out, Hush, here comes the Alderman. Mary Mackdonnel upon this said Damn the Alderman; and presently abused him to his Face in a very outrageous Manner. The Justices upon this examined Mary Mackdonnel concerning this Fact; and one of these Justices was the Defendant, who was likewise Chairman and Recorder of the Town. The Woman pretended that just before the Alderman came up, she was talking of one Alderman Porter of Dublin, and Alderman Bingley applied to himself what she had been speaking only of the other Alderman. She proved likewise that she was born in the City of Chester, and lived there with her Father at that Time. However she begged Alderman Bingley's Pardon upon her Knees; and he declared that he forgave her. The Justices took this Matter up, and of themselves convicted her on this Evidence, upon the Statute of 12 Ann. 2. 23. (5.) which Conviction was put in Execution, by her being severely whipped the same Day. Upon this State of the Fact, M^r. Fazakerly submitted it, that the Rule ought to be discharged. He said, it was beyond all Dispute, that Mary Mackdonnel was misordering herself before Alderman Bingley; and therefore he conceived that she was convicted within the Words of the Act of Parliament. But admitting that this Conviction was not strictly within the Meaning of the Act of Parliament; yet as there appears to have been no Sort of Malice in this Proceeding, he apprehended the Court would not interfere; but leave the Party to her ordinary Remedy. M^r. Wilbraham on the same Side said, that the Court that made this Conviction, was a Court of Sessions; and therefore he conceived they were not punishable for any Thing they did in their judicial Capacity. And for this Purpose cited Stamford 173. Rep. 12. 23. But supposing the whole Court should; yet he said it would be very hard to single one particular Person of it. The Court said, that they thought they had an undoubted Jurisdiction to punish all inferior Judges, when they are guilty of any Oppression in the Execution of their Authority. And so Judge Probyn said the Case of Sir John Austin and others, Mich. 6 Geo. 2. The Court there had no Sort of Doubt, but that they might have granted an Information against him, notwithstanding they were acting as Justices in their Petit Sessions. And as to there being no Information prayed against the other Justices in this Case, they said this

How far an Information may be granted against Justices of Peace, for what they do in their Sessions.

was no Objection that the present Defendant could make, and so constant Experience shews in Matters of the like Nature. They said they were clearly of Opinion, that upon the Evidence laid before the Justices the Woman ought not to have been convicted upon the Statute of 12 Anne, for that Statute does not speak of all Persons that are misordering themselves, but of such Persons only that are Vagrant and misordering themselves; which there is no Pretence to say, that the present Person was, because she was born in the very Place where the Complaint was, and liv'd there in her Father's Family. The single Question therefore for this Court to consider they said would be, whether according to the Circumstances of this Case the Information ought to go. Now as to that the Original Sessions appears to have been held the 29th of November before, two Quarter-Sessions therefore must have been held in the mean Time, and it is a Rule, that no one Sessions can be adjourned into another; for which Reason the holding the present Court, they said, was plainly irregular. The Woman being there too without a Warrant, Judge Probyn said, was another Circumstance, that was so. But if this had been a regular Sessions, and the Woman properly before them, Judge Page said he thought the Sessions had nothing to do with this Matter. They said farther, that Alderman Bingley declared he forgave the Woman; so that what the Justices did was at that Time without Complaint. They observed, that this Construction that was made upon the Words of the Act was so notoriously groundless, that what the Justices did they took to be manifestly an Act of Oppression; accordingly made the Rule absolute.

The King and Eyres and others.

What shall
not be a sufficient
Cause
for granting
an Information
against
a Court of
Sessions.

ON Rule to shew Cause, why an Information should not go against the Defendants, who were by Charter appointed Justices of Sessions in the City of Sarum; the Fact came out to be in the Manner following. The Defendants had never held a Court since the Year 1723. by Reason that the Recorder of the City, who generally assisted at this Assembly, was made Chancellor of Ireland, and that they had little or no Business. However upon a Mandamus coming down to them lately to make a Rate, they were obliged to hold one, which they intended to do for that particular Purpose only. When the Court was sitting, a Bill of Indictment for a Nuisance was offered to be preferred before them; but they had summoned no Grand Jury; and upon that they made an Entry in their Books, that this Indictment should be rejected, giving this special Reason for it, that they had assembled themselves as a Court for this present Purpose only of making a Rate; and yet in the Title of the Court they had called themselves a General Sessions. The Attorney General submitted it, that this was a very unwarrantable Act of Power, and therefore prayed that the Rule should be made absolute. Judge Probyn said, that he had a Doubt, whether a General Sessions had Continuance

lance of Indiaments for Nuisances. To this the Attorney General answered, that he had heard it often said in this Court, that every Sessions at Hicks's Hall is a General Sessions; and yet nothing is more known, than that they hold Plea upon these Indiaments constantly. However the Court said, that as this was a particular Franchise, that had Authority indeed to hold such Court, but held them very seldom, they took it there was nothing in this Case but a Mistake in Judgment in the Justices; and therefore they discharged the Rule.

Macartney and Barow.

ON Rule to shew Cause, why the Defendant should not be discharged out of Execution upon the late Act of Bankrupts made 5 Geo. 2. Mr. Strange said the State of the Fact was in the Manner following. In the Months of December and January 1728. the Defendant drew Bills of Exchange upon one Parminteer and others beyond Sea, which were not accepted. On the 13th of the same Month of January a Commission of Bankruptcy was sued out against the Defendant, tested the same Day; and in the Months of February, March and April following these Bills were returned and protested, and Notice was given of this to the Defendant. The Plaintiff has since brought an Action upon these Notes against the Defendant, as Drawer of them, has obtained Judgment and taken the Defendant in Execution. On the Twenty-fourth of March last the Defendant obtained his Certificate, and since has applied for a Rule to shew Cause, why he should not be discharged out of Custody upon the late Act of Parliament that has been mentioned. Mr. Strange said he did agree, that as no Day is mentioned, on which the Defendant became a Bankrupt, it must be taken that he was a Bankrupt only on the Day in which the Commission of Bankruptcy bears Teste; and therefore that he was not a Bankrupt at the Time the Bills were drawn. But he observed the Cause of this Action was the Protesting the Bills as well as the Drawing them. The Protesting them was after the Commission; and therefore the Substance of this Case was not within the Relief of the Statute of 5 Geo. 2. But, if the Substance was, yet he apprehended clearly, that the Method of pursuing it was not. For the Clause in this Statute, which the present Motion is founded upon, is the last but two in that Act of Parliament; and that Clause gives such Persons as obtain Certificates before the 25th of March last only such Relief as was given upon the Statute of 5 Geo. 1. which is by Plea only of the general Issue before Trial, and not by Motion after Judgment and Execution. He did agree, the Statute of 6 Geo. 1. allowed Discharges by Certificate even upon Motion at any Time; but this Clause in the Statute of Geo. 2. having Relation to the Statute of 5 Geo. 1. and not to the Statute of the 6th, he apprehended the Party was not relievable in this Way upon Motion, but must take his Remedy by Audita Querela. Judge Probyn and Judge Lee were

Construction
on the Sta-
ture of 5
Geo. 2. re-
lating to
Bankrupts.

were only in Court; and they said, that this Matter came before Judge Page at his Chamber, and therefore directed it to be moved again when that Judge is in Court. *Vide postea.*

Anonymus.

Vide ante.
239.

THE Matter was of Opinion, upon this Matter coming before him, that Counsel's Hand was not necessary; accordingly the Plaintiff paid the Defendant the Costs of his Judgment, and both Parties agreed to take Notice of Trial for the last Sittings in Term. *Ex relatu.*

Jones and his Wife as Administratrix of Jane Harvey
against Heeman.

Vide ante
243.

THIS Matter coming on again, the Record was more particularly opened than before, and was in this Manner. In Debt upon a Judgment in this Court, where the Recovery was for 41 l. the Plaintiffs declared under an Administration committed by the Bishop of Exeter as Archdeacon of the Diocese of Cornwall; which Administration was said to be granted by him at Westminster. The Defendant pleaded Nul tiel Record of that Judgment, which was found against him; and now in Arrest of Judgment M^r. Gapper cited Lutw. 401. in Point; and farther relied upon Moor 145. Salk. 40. 3 Cro. 472. Noy 54, and Dyer 305. M^r. Hussey argued on the other Side, and said that this Administration was said to be granted at Westminster; and he submitted it, that the Court could not judicially take Notice, but Part of the Archdeaconry of Cornwall might extend itself into the County of Middlesex; and if so, the Administration was well granted. But admitting, that the Administration is not rightfully set out in the Declaration; so that the Defendant might have taken Advantage of this Defect upon a Demurrer; yet, he submitted it, that in Arrest of Judgment such Defect cannot be taken Advantage of; and that this is cured by the Statute for the Amendment of the Law, or at least by the Statute of 5 Geo. 1. 13. The Court said the present Case was by no Means like that of a Cleric; but if there had been a Cleric, they should have thought it would have made no Difference; and Judge Lee said the Case in Lutw. that has been cited, seemed to be a direct Authority in Point. Accordingly the Court made a Rule that Judgment should be arrested, unless Cause on Saturday seven-night.

Herne and Bushel.

A Writ of Error had been brought in this Court upon a Judgment in the Marshalsea, and that Judgment affirmed. Upon this the Plaintiff in Error brought another Writ of Error quod coram vobis residet. Mr. Parker now moved, that the Plaintiff in the Original Action might have Liberty to take out Execution, notwithstanding this Writ of Error. He said, he did agree, that where a Writ of Error in this Court abates by the Death of the Parties, another Writ of Error will lie here quod coram vobis; but he submitted it, that in no other Case upon a Writ of Error in this Court will an Error quod coram vobis lie. Judge Page declared, that he was of the same Opinion; accordingly made a Rule to shew Cause.

In what Cases a Writ of Error quod coram vobis will not lie.

The King and Adey.

THIS was a Scire facias upon a Recognizance of Bail, with Condition, that the Defendant should carry down an Indictment to Trial by such a particular Time; the Defendant did not carry it down exactly at that Time; but carried it down soon after, and likewise the Bail had surrendered the Defendant since. Mr. Lacey now moved, that Proceedings on this Recognizance might be staid upon Payment of Costs. The Court said, that they had no Power to dispose of the King's Money; and they thought the only Method the Party had to take was to apply to the Attorney General for a Nolle prosequi, or to compound this Matter in the Exchequer.

When a Recognizance has been entered into that a Defendant shall carry down an Indictment to Trial, and a Scire facias is brought upon that Recognizance, how far the Court has no Authority to stay the Proceedings in it.

Leehill and Sir Thomas Reynolds.

IN an Action of Covenant for the Arrears of an Annuity, Mr. Field moved, that upon bringing into Court Principal, Interest and Costs, Proceedings might be staid. He said, in Covenant for Rent, he has been informed, the Court has granted the like Motion; and therefore he hoped they would make the same Rule in this Case. Accordingly a Rule was made to shew Cause. Vide post.

In what kind of Actions the Court will stay Proceedings on bringing into Court the Money which is demanded together with the Costs.

Anonymus.

IN an Indebitatus Assumpsit Mr. Kettleby moved for Liberty to plead Non Assumpsit and a Tender. He said the Court has allowed Not guilty and De son assault to be pleaded in Battery; and therefore he submitted it, they would make the like Rule in this Case. Judge Page said, in the Common Pleas Non cepit and an Abowry were refused in Replevin. And the Court declared, they thought they never ought to

How far the Court of King's Bench will not allow of Double Pleas to be pleaded, by Reason that they are inconsistent.

allow these Pleas, where they are inconsistent with one another. Accordingly the Motion was refused.

Dale and Mottram.

How far a
Demurrer
shall be said
to be an issu-
able Plea.

IN Debt upon an Award-Bond the Defendant applied to Judge Probyn at his Chamber, that he might have Time given him to plead; accordingly the Judge did give him till such a Time upon his agreeing to plead an issuable Plea, and take Notice of Trial. The Defendant accordingly did plead No Award; the Plaintiff replied, that there was one and shewed a Breach; to this the Defendant demurred, by reason that the Plaintiff had not assigned a sufficient Breach. Mr. Fazakerly now moved, that the Plaintiff might have Liberty to sign his Judgment, by Reason that the Plaintiff had replied a Breach only for Form's sake, and the Defendant ought not to have demurred, in as much as it was against his own Agreement, which was to plead an issuable Plea. Judge Page said, that he thought a Demurrer was an issuable Plea in Law, and every Plea was so but a Plea in Abatement. Judge Probyn doubted. But Judge Lee inclined with Judge Page. Accordingly the Motion was refused.

Bury and Russel.

How far the
Plaintiff
shall be al-
lowed to file
common Bail
for the De-
fendant with-
in the Mean-
ing of the
Statute of
Geo. 2.

THE Plaintiff had filed Common Bail for the Defendant within seven Days after the Return of the Writ, whereas by the Rules of the Court the Defendant had till the eight Days were out to do it himself in, and after eight Days were out the Plaintiff served the Defendant with a Copy of the Declaration. Mr. Fazakerly submitted it, that this was irregular, and therefore moved, that the Common Bail filed by the Plaintiff might be set aside. But the Court refused the Motion.

The King and Wothrington.

When an At-
torney is
committed
for Misbe-
haviour,
how far the
Court will
not bail him,
notwith-
standing he
has not yet
been report-
ed to be in
Contempt.

THE Defendant having been committed for very ill Practice as an Attorney, particularly in making a prevaricating Affidavit, Mr. Kettleby moved, that he might be bailed till he should be reported in Contempt; and mentioned the Case of The King and Clendon, where the like Motion was granted. The Court said, that they thought the Offence of the present Defendant to be much greater, than the Offence of the other; accordingly the Motion was refused. But then the Counsel of the other Side offered, that if Mr. Wothrington would go before the Master and make the Party Satisfaction for the Injury he had done him, the Interrogatories should be waived; which was agreed to.

Macartney and Barow.

THIS Matter coming on again, Mr. Folkes argued for the De-^{Vide ante}
 fendant. He said he did agree that the Statute of 5 Geo. I. 251.
 which was mentioned on the former Motion, was a temporary
 Act; he did agree that the Statute of 6 Geo. I. had Relation to
 the former Statute; but yet as no Time is mentioned for the
 Expiration of that Statute, he submitted it, it was a perpetual
 Law, and subsisting at this Day. The Words of that Statute,
 he said, were that every Bankrupt obtaining a Certificate shall
 be discharged from all Debts due and owing at the Time he
 became a Bankrupt. The Bills of Exchange, which the De-
 fendant drew, by the very drawing them became Debts of the
 Defendant. For which Reason he submitted it, that this Cer-
 tificate was a full Discharge of those Debts by the Words of
 the Act of Parliament. But if there was any Doubt upon that
 Statute, the Act of 7 Geo. I. has made the present Case more
 clear; for that Act provides that the Bankrupt shall be dis-
 charged from all Debts contracted at that Time, though pay-
 able at a future Day. If this was so, he said there would be
 no Doubt as to the second Objection that was made upon the
 former Motion, that the present Application of discharging the
 Defendant upon Motion, was very regular. Mr. Strange ar-
 gued on the other Side and submitted it, that it appears from
 what was allowed by Mr. Folkes, that the Statute of 6 Geo. I.
 expired with the Statute of the 5th. And as to the Statute
 of the 7th he said he apprehended that was confined to such Cre-
 dit only as is given for Goods sold in Trade; which appears by
 the Preamble of that Statute; and he had an Affidavit to pro-
 duce, that the present Bills were drawn for Money lent the De-
 fendant by the Plaintiff. But what he principally relied upon
 in the present Case was, that it was incumbent upon the other
 Side, to ascertain the Time by Affidavits, when the Defendant
 became a Bankrupt; the Act of Bankruptcy makes him one,
 and not the Commission. The Act of Bankruptcy must be pre-
 sumed to be before the Commission; and it might have been so
 long before, as to have been precedent to the drawing of the
 Bills. This Fact he said was in their Knowledge, and not in
 the Plaintiff's; the Proof therefore of that Fact was incum-
 bent upon them, and not upon the Plaintiff. And if the Fact
 was so, that the Bills were drawn after the Act of Bankrupt-
 cy, there was no Pretence to say that the Certificate was a
 Discharge of them. The Court said as the Fact stands at
 present, they would take the Act of Bankruptcy to be just before
 the suing out the Commission; and if the Plaintiff insists upon
 the contrary; if he insists upon it that the present Bills were
 drawn mean between the Act of Bankruptcy and the Commission,
 that Fact is incumbent upon him to make out, and as he has not
 done it, they would take it to be otherwise. Then as to the
 Statute of 6 Geo. I. they were of Opinion it was a perpetual
 Act, and they thought the present Defendant well relievable un-
 der it. And if he was not under that Statute, they should have
 thought

thought he clearly would have been under that of the 7th. Accordingly they made the Rule absolute.

Innys and Sinclair.

What shall
be said to be
a sufficient
Affidavit, or
not, in order
to hold a Per-
son to special
Bail within
the Meaning
of the Sta-
ture 12 G. 1.

MR. Fazakerly moved that the Defendant might be discharged out of Custody upon a common Appearance. The Statute of 12 Geo. 1. he said, requires that no Person shall be held to special Bail, unless there is an Affidavit of the Plaintiff's Cause of Action made before the Arrest, and an Indorsement upon the Back of the Writ of such Cause of Action. In the present Case he did agree that there was an Affidavit made before the Arrest by Grayman, and not by the Plaintiff, that the Defendant was indebted to the Plaintiff in the Sum of 948 l. 17 s. 6 d. but then come the Words, as appeared to this Deponent by a certain Instrument under the Hand and Seal of Henry Goffman, Notary Publick at Hambrough. He submitted it, that this Affidavit was by no Means certain enough; for Grayman does not swear positively that the Defendant was indebted to the Plaintiff in that Sum, but only as appeared to him by such an Instrument. Besides, he said he had an Affidavit from the Defendant, wherein he swears positively that at the Time of the Arrest he did not owe the Plaintiff a Penny. Mr. Strange argued on the other Side, and said that nothing was more certain, than that the Plaintiff himself is not obliged to make the Affidavit, which is to hold the Defendant to Bail; for the Words of the Act of Parliament by no Means require it, and besides, a Book-keeper may very often be able to make such Affidavit, when the Plaintiff himself cannot. He said farther, that he took it to be very clear that the Defendant's Affidavit shall not be allowed to controvert any Thing in that which is made on the Part of the Plaintiff; for the Act of Parliament only requires, that there shall be such Evidence given of the Debt before the Arrest, as an Affidavit to be made of it; and it is not now to be enquired into, whether that Affidavit be true or false. However, he said, he would agree that the Affidavit that was made before the Officer, possibly was not certain enough; and if no Affidavit could be produced but that, possibly the Defendant should be discharged upon a common Appearance. But he observed that he had another Affidavit in his Hand made by Mr. Grayman since the Arrest, wherein he swears that he saw the original Bond at Hambrough under the Hand and Seal of the Defendant, and farther swears positively, that upon talking with the Defendant since the Arrest, the Defendant owned that he was indebted to the Plaintiff in the very Sum that had been sworn to in the Affidavit. Mr. Fazakerly by way of Reply submitted it, that the Court ought not to regard this second Affidavit that is produced. The Act of Parliament requires that an Affidavit shall be made of the Cause of Action, before a Man shall have his Liberty taken away by an Arrest. This must be understood to be a sufficient Affidavit. And now it is admitted by the other Side, that the Affidavit was not sufficient. For which Reason he apprehended that clearly the

the Defendant ought to be discharged. The Court agreed that an Affidavit from the Plaintiff himself cannot be requisite in this Case, and likewise, that the Defendant's Affidavit could not be admitted to be read. They agreed farther, that if this Matter stood singly upon the Affidavit that was made before the Arrest, the Affidavit was not certain enough, and the Defendant must be discharged upon a common Appearance. But whether this second Affidavit should be allowed, or not, was a Matter which the Court was in Doubt of. Judge Page and Judge Probyn said that they did agree this Certificate from the Notary Publick, which Mr. Grayman swears he saw, would not be a sufficient Evidence of the Debt, in our Law; but so great Regard is had to such Acts in foreign Countries, that according to the Civil Law, it would be Evidence. By this they said it appears, that the Officer has not acted rashly in giving that Credit to the Affidavit, as to indorse the Writ upon it; and by the Act of Parliament the Affidavit is produced before the Officer, and he is to judge upon it. For these Reasons they thought that when another Affidavit is produced before the Court, which they themselves would judge to be sufficient, this Court ought to interfere and discharge the Defendant out of Custody. Judge Lee was of a contrary Opinion in this Point, and thought that this Matter must singly depend upon the Affidavit that was made before the Arrest. As soon as the Court had declared their present Sentiments in this way, they said they would confer with the Judges of the Common Pleas about this Point; and accordingly, that the Matter might be argued more fully, they made a Rule to shew Cause, and ordered the Affidavits on both Sides to be filed. Vide Postea.

Anonymus.

MR. Benny moved that the Plaintiff might have Liberty to amend his Declaration in several Mistakes that were made in the Name of the Defendant; and this notwithstanding the Defendant had let Judgment go by Default. The Terms upon which he made this Motion were, that the Plaintiff should waive his Judgment, and pay the Defendant his Costs. Accordingly a Rule was made to shew Cause.

How far the Court will give Liberty that a Declaration may be amended after Judgment.

Kampier and Wright.

THIS was a Writ of Error upon a Judgment in the Common Pleas in an Action of Debt upon an Escape against the Warden of the Fleet; and the Judgment was given upon a Verdict. The Declaration set forth, that William Wilkinson was indebted to the Plaintiff in the Sum of 200 Pounds, and for the Recovery of this Debt the Plaintiff sued out a Latitat against him, upon which he was arrested and in Custody of the Marshal of this Court. It was further set forth, that so being in Custody he was removed by Habeas Corpus before Mr. Justice Denton, one of the Judges of the Court of Common Pleas, and

When a Person is committed to the Marshal of the King's Bench, what shall be said to be a good Commitment of that Sort, or not.

What shall
be said to be
a good De-
claration in
an Action
of Escape

that Mr. Justice Denton committed him to the lawful Custody of the Warden of the Fleet charged with this Latitat; and that he so being in Custody, the Warden suffered him to escape. Serjeant Hawkins argued that this Declaration was bad in Substantive, and therefore that the Judgment ought to be reversed. He said there was no Rule better known, than that no Person can be removed from the Prison of one Superior Court into the Prison of another, unless there is some Cause depending which concerns the Party, in that Court to which he is removed. The Habeas Corpus itself did not give Mr. Justice Denton a Jurisdiction to remove the Prisoner from the Custody of the Marshal to the Custody of the Warden; but it was the Habeas Corpus, together with a Cause depending against the Party in the Court of Common Pleas, that must jointly together have given him such a Jurisdiction. As this Matter therefore, namely, of there being a Cause depending against the Party in the Court of Common Pleas, was a Matter essential to the Judge's having a Jurisdiction to remove the Prisoner, it ought to have been set forth in the Declaration, that there was such Cause depending. To make a Gaoler answerable for an Escape, it is not enough to say that such a one was his Prisoner and escaped; but it must be shewn that he was his lawful Prisoner. And to make a Man to be a lawful Prisoner, it is necessary that the Person committing him had a lawful Authority to commit him. That Mr. Justice Denton had not, no more than a meer private Person, unless there was such Cause depending in the Common Pleas, as has been mentioned. And that Fact ought to have been alleged in the Declaration, in order to shew that the Person committing had an Authority to commit; that is, in order to shew that the Prisoner escaping was a lawful Prisoner. And for Authorities to shew how Declarations of the like Nature in Actions of Escape have been, he cited 1 Rol. Rep. 217, 276. 2 Leon. 84. 3 Cr. 877. 2 Cr. 394. Moor 274. Lut. 1468. Another Exception which he took to the Declaration was, that this Commitment by Mr. Justice Denton is to the Warden of the Fleet; whereas it ought to have been Prisonæ de la Fleet. He did agree that Commitments to the Marshal of the King's Bench are to the Person of the Marshal; but Commitments to the Warden are always to the Prison of the Warden, the one is personal and the other is local. And so he observed was the constant settled Form of all the Precedents; which the Court will adhere to. Mr. Dennison argued on the other Side, and said that this Matter bore great Debate in the Common Pleas for several Times together, wherein the Court were sometimes divided; but at last they gave Judgment unanimously for the Plaintiff. To the first Objection he said the Declaration was, that the Prisoner was brought before Mr. Justice Denton, charged inter alia with a Latitat. Amongst these alia might have been a Cause depending in the Common Pleas against the Party. Whatever they were, they were not in the Plaintiff's Privy and Knowledge; and therefore he could not be obliged to set them forth. He observed that the present Declaration was drawn as all other Declarations are drawn of this Sort; and for this Purpose cited a Precedent in Lev. 56. Viv. Ent. 181. 2 Brownl. Ent. 13, 14. Rob. Ent.

307. and Lil. Ent. 157, 188. To the second Objection he did agree, that generally the Forms of the Precedents run in that Distinction; but this Form is not constantly observed, and that shews the Form is not necessary. For this Purpose he observed, that in Lilly 157. the Commitment is to the Warden of the Fleet; and in Viv. 194. Rob. 302. the Commitment is to the Prison of the King's Bench; and in 8 & 9 Will. 26. the Words of the Act of Parliament constantly run, to the Marshal of the King's Bench, or Warden of the Fleet. Besides he observed that this Defect could at most make the Commitment only erroneous, and not void; and it is a known Rule, that notwithstanding a Commitment be erroneous, the Gaoler shall be answerable, if the Prisoner escapes. And for this Purpose he cited 5 Mod. 19. Salk. 272, and 348. and Carth. 148. The Court declared, as this Matter bore a good deal of Debate in the Common Pleas, it might be proper to be farther considered of. But Judge Page said, according to his present Thoughts, neither of these Exceptions would prevail. To the first he said, the Act of the Judge is the Act of the Court; and he thought the Habeas Corpus itself gives the Court a Jurisdiction. If there had been no Habeas Corpus, or if the Habeas Corpus had been void, he said it might have been otherwise; but he thought it could not be incumbent upon the Plaintiff to set out the Cause depending in the Court of Common Pleas against the Prisoner; because that was a Matter not within his Privity. He said likewise, that all the Precedents that he ever saw, were in this Form; and therefore he thought the Declaration good, notwithstanding this Exception. To the second he said, that in general there might be good Reason for there being that Difference between the Form of the Commitments to the one Prison and to the other. He said he has often heard it said in this Court, that the Marshal of the King's Bench has no particular Prison which he is confined to keep his Prisoners in; and Lord Holt declared once, that it extended to the East Indies. The Marshal is bound, to attend upon and follow the King's Bench wherever it sits; and to his Person the Prisoners are always committed. But the Prison of the Fleet is local and confined to a certain Place. However, he said there was no Doubt to be made, but if the Commitment is to the Prison of the Fleet, and the Warden is removed from his Office, the Prisoner must be turned over to the Warden's Successor; before he is answerable with any Escape. That shews that the Person of the Warden is supposed to have the Custody of the Prisoners, and not the Walls of the Prison; for which he thought that the Commitment to the Warden was good in Point of Form. But if it was not, it was at most erroneous only, and not void; for which Reason, notwithstanding this Exception, the Gaoler must be answerable for this Escape. Judge Probin declared himself to be of the same Opinion. But Judge Lee did not speak to these Points at present; because it was agreed that they were to be argued again.

The King *and* Jordan.

When a Person is brought up by Habeas Corpus, how far the Court will only remand him.

THE Defendant having been brought up by Habeas Corpus, it appeared upon the Return, that he was committed upon an Indictment of Forgery, which was to be tried in the County this next Assizes. Mr. Kettleby moved in Behalf of him, that he might be turned over to the King's Bench Prison upon an Information granted against him by this Court, Trin. 5 Geo. 2. The Court, upon Inquiry of their Officer, said, that he had appeared and pleaded to that Information; so that they had nothing to do with him till Conviction upon it; for which Reason they ordered him to be remanded.

Leehill *and* Sir Thomas Reynolds.

Vide ante

MR. Hollins came now to shew Cause, and said, that the Plaintiff had been under a Necessity of bringing continually Actions against the Defendant for the Arrears of this Annuity; that some of the Arrears recovered by those Actions and the Costs upon them were not paid to this Day; and therefore he submitted it, that the Court would discharge this Rule, unless the Defendant would agree to bring into Court the Arrears and Costs upon those Actions, as well as what was due upon this. For he said, when a Man comes for Equity, he shall do Equity. Mr. Peild on the other Side said, that he had no Authority to consent to such Terms as these; and therefore desired a little Time to talk with his Client. The Court said, they would not make this Rule absolute, unless he would consent to these Terms; accordingly discharged it, unless he should consent by to Morrow. Vide postea.

Herne *and* Bushel.

Vide ante
253.

MR. Strange came now to shew Cause, and said he had the Proceedings in his Hand in a late Case, which directly justified the Proceedings in the present one. It was the Case of Thomson and Lyon, East. 4 Geo. 2. There this very Attorney Mr. Glover, who made the Affidavit which the present Rule to shew Cause was made upon, made an Affidavit in that Case, that an Action was brought in the Marshalsea for Goods sold and delivered, to which the Defendant pleaded Non Assumpsit; that she gave in Evidence her Coverture upon that Plea, but that the Jury were of Opinion against her, and found a Verdict for the Plaintiff; that after this she brought a Writ of Error in this Court, and assigned the general Errors, but the Judgment was affirmed; and that notwithstanding all this she brought a Writ of Error quod coram vobis, wherein she assigned the same Error in Fact, which she had insisted upon for Evidence at the Trial, and was found against her. Upon this Affidavit the Court made a Rule to shew Cause, why the Assignment of Errors

Errors should not be set aside; but afterwards the same Term, on Mr. Strange's own Motion the Court discharged it. Mr. Parker desired Time to look into this Case; accordingly the Rule was enlarged till Monday. Vide Postea.

Anonymus.

MR. Lacy moved for a Superfedeas to discharge the Defendant out of Custody, upon Account of his laying in Prison ever since Trinity Term last, and the Plaintiff's having not declared against him during all that Time. Mr. Marsh on the other Side, said he did agree, that the Defendant was arrested upon a Latitat in Trinity Term last, and that he had lain in Custody during that Time, without being served with a Declaration. But from Trinity Term till the Beginning of Hilary he was in the Custody of the Sheriff below, and after that, he was brought up into the Custody of the Marshal; so that though he was in Custody above two Terms, yet in the same Custody he was not; and the Words of the Rule of Court, which was made for this Purpose, Trin. 2 Geo. 1. are & sic in Custod' remanebit, which, he submitted it, required, that he should be in the same Custody. The Court thought that there was no Weight in this Exception; accordingly granted the Superfedeas.

How far the Court will grant a Superfedeas in order to discharge a Person out of Custody, by Reason of his not being declared against in due Time.

Hoskins and Squire.

ON Rule to shew Cause why Judgment should not be arrested, by Reason of the Proceedings being in Latin, whereas it was objected, they ought to have been in English, by the Statute of 3 Geo. 2. 27. Mr. Draper submitted it, that the Proceedings were very regular. The Declaration he said was of Easter Term last, which was before the Aa took Place. After the Aa took Place, the Defendant put in his own Plea in Latin, and all the Proceedings followed that; which he apprehended was very Right, that they should do so. Accordingly the Rule was discharged.

Construction on the Statute of 3 G. 2. 27. which requires that Law Proceedings shall be in English.

N. B. The Damages laid in the Declaration were 10 l. those found by the Verdict only 7 l. 2s. but upon this Point the Court gave no Opinion. Vide Postea.

The King and Cotton.

MR. Hayward now moved this Matter again. The Statute of 18 Eliz. 3. he observed, requires that the Justices, upon Examination of the Circumstances of the Case, shall make such Order therein, as in their Discretion they shall think fit. A due Examination, he apprehended, could not be made, but on hearing the Parties on both Sides. For which Reason, even from the Words of the Aa of Parliament, he conceived, a Summons was necessary. But the Resolutions, that have been in this Court, he thought had made it so very clearly. In the

Vide ante 241.

Case of The King and Gregg, Mic. 13. of the late King, and in that of The King and Holland, Trin. 5 Geo. 2. he did agree that the Court were of Opinion, that a Summons need not appear upon the Face of the Order. But according to the Note that he had taken of those Cases, the Court declared that if there was no Summons you may complain. And in the Case of The King and Allington, and The King and Squire, Hil. 12 Geo. 1. as he took it, the Court did grant an Information for the Justice's not summoning the Party. Judge Lee said, that in those Cases of The King and Gregg, and The King and Holland, he did not remember that such Thing was said; and as to the two last Cases, he took it, that what the Court founded themselves upon there, was, that the Justices had returned that they had summoned the Party, whereas in Fact they had not; so that it was for the false Return. However in the present Case the Court made a Rule to shew Cause why the Information should not go. Vide Postea.

Herne and Bushel.

Vide ante
260.

THIS Matter coming on again, Mr. Parker said he did agree, that in the Case that was last cited a Writ of Error quod coram vobis was brought after Affirmance of a Judgment upon a Writ of Error. But in that Case no Objection was taken that it would not lie; and therefore that Precedent could not be of a great deal of Weight. But in the Case of Lamben and St. John, Hil. 12 Geo. 1. it was expressly determined on his Motion, that a Writ of Error quod coram vobis would not lie after Affirmance of a Judgment of this Court in the Exchequer Chamber; yet there a Remittitur is entered of Record, as soon as the Judgment is affirmed, and Execution is awarded in this Court. And the same Point he said is held in 2 Lev. 38. 3 Keb. 28. Mr. Strange argued on the other Side, and said, that besides the Precedent that he had cited on the former Motion, the same Point appears in Salk. 337. Sho. 349. Yel. 117. 1 Rol. Ab. 755. He did agree that in Rol. Ab. it is said, that a Writ of Error quod coram vobis will lie in Hibernia; but it appears by the Case itself, that those last Words must be a Mistake; and this is made more plain by the Case in Yelv. where the Case in Rol. Ab. is reported at large. Judge Lee said, that he thought the material Point to be considered was, what Error in Fact the Party intended to assign; for these Writs of Error quod coram vobis, are not de jure; and it is in the Breast of the Court, whether it shall be a Superedeas to Execution. And so he said this Point appears in 1 Mod. 285. 1 Ven. 208. in the Case of Waller and Stokoe, Carth. 369. and in that of Butler and Lusitanoe, Judge Page and Judge Probyn declared too, that they were of the same Opinion. Upon which Mr. Strange said, that then the Rule for taking out Execution was applied for too soon; for at present they had not assigned their Errors, and they did not know what Errors were intended to be assigned. The Court then said, that they would not suffer this Writ of Error to stay the Execution; accordingly the Rule was made absolute.

Court and Gilbert.

A Rule had been made upon Churcher, the Plaintiff's Attorney, to shew Cause why he should not deliver back a Counter-part of a Lease, which the Plaintiff had delivered him, in order to bring an Action of Covenant against the Defendant. Mr. Strange came now to shew Cause, and said that the Attorney had some way lost this Deed by an unavoidable Accident; but that the Plaintiff was not without Remedy; for he might bring a Bill of Discovery against the Defendant, to make him set out, whether there was not such Lease, and what the Lease was. He said he did agree that the Attorney ought to be at the Costs of this Discovery; but yet as the Circumstances of this Case were, he submitted it, the Court would not proceed in this Way against him by an Attachment. Judge Page said that he remembered the Court of Exchequer did proceed in this summary way against an Attorney that had his Pocket picked of the Postea, which he was carrying to Lincoln's Inn. He said that he thought the Attorney himself ought to procure a Discovery of this Deed, by a Bill in Chancery; but on the other Hand, that the Plaintiff should allow him to make use of his Name for that Purpose. Accordingly the Court granted an Attachment against him; but ordered it to lie in the Officer's Hand, till farther Direction given.

When a Client intrusts his Attorney with a Deed, and the Attorney happens to lose it by Accident, how far the Court will grant an Attachment against him.

Bailey and Colebourn.

MR. Lacy moved now for Judgment. He said the Court of Common Pleas have had several Cases on this Act of Parliament greatly debated before them, and at last they unanimously resolved that the Plaintiff's Cause of Action should be considered what he himself had said in his Declaration; accordingly they have given this Judgment in four Cases that have been before them; and he hoped this Court would be of the same Opinion. The Court declared that they thought this a Matter which deserved to be spoke to, when the Court was full. Judge Page said his present Opinion was, that the Judgment ought not to be arrested. This Act of Parliament he said has a Relation to that made in 12 Geo. 1. and by that Statute the Plaintiff's Cause of Action is considered what he shall make Affidavit of before the Arrest. This he thought ought to be the Rule in the present Case. And as the Fact was, that the Plaintiff held the Defendant to Bail, and consequently must have made such an Affidavit, he did not see but he was well intitled to Judgment. Judge Probyn and Judge Lee declared their present Thoughts to be, that the Sum ascertained by the Verdict could only be considered the Plaintiff's real Cause of Action. And Judge Lee said, as this was a Motion in Arrest of Judgment, the Court could only judge upon the Record; for which Reason he did not see that they could any ways inquire into the Fact, whether

Vide ante 177.

ther there was such Affidavit, or not. Accordingly this Matter stood over. Vide Postea.

Burden and Tomlyn.

Vide ante
232.

MR. Jocelyn came now and said he did agree that he had not given Notice; but as the Circumstances of this Case were, he apprehended Notice was not necessary. He said he had in his Hand a Rule that was made in Mich. Term last, whereby the Court ordered that Judgment should be entered for the Plaintiff. He had another Rule in his Hand made last Term, which he agreed was upon his Motion, whereby the Court made a Rule to shew Cause, why the Judgment should not be perfected by filling up the Blanks in it, which were left for inserting the Costs. And a third Rule, he said, he had in his Hand, whereby the Court ordered that the second Rule should be discharged. These he said were all the Rules that had been made in this Cause. And as there was a Rule that Judgment should be entered, he apprehended he was now intitled to move for another to shew Cause, why it is not entered. In that manner he agreed he ought to have moved for his second Rule, and not in the Manner he did. For which Reason the Rule that was made at that Time was an improper Rule; and consequently the Discharging an improper Rule could not prevent him now from moving for a proper one. The Court declared that they would make no Rule without Notice; and Judge Probyn said he believed, if Notice should be given, the giving it would be ineffectual.

Anonymus.

Where the Court of King's Bench sets a Fine upon a Person, in what Manner they may direct that the Fine shall be distributed.

MR. Kettleby moved upon the Petition of Mary Reedwilson, which was verified by Affidavit, setting forth, that she was admitted to sue in forma Pauperis, to prosecute Cox and Charlesworth, and that they were each of them fined 50 Pounds; whereupon she prayed, that she might have Part of these Fines. Accordingly the Court made a Rule, that she should have a third Part of them; and said that the Privy Seal gave them no Power to dispose of any greater Share of them.

How far the Court will not grant an Information in Nature of a Quo Warranto against an Officer of a Corporation, notwithstanding he was sworn into his Office by a Mayor de facto.

The King and Pursehouse.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not be granted against the Defendants, for executing the Office of Burgeses in the Town of Walsham. M^r. Verney said that the Objection, that had been made against some of them, was, that they had been sworn into their Office by one who was Mayor de facto only, and not de jure. He said he did agree, that a Mayor de facto cannot hold corporate Assemblies to fill up Vacancies; but as to collateral Acts, such as swearing in Officers and the like, he apprehended there was no Pretence to say but what he does is legal. Judge Page agreed to

to this Distinction; but because there were other Objections against these Officers, the Court made the Rule absolute.

The King *against* The Mayor and the rest of the Corporation of Esham.

A Mandamus had been granted by the Court against the Defendants, requiring them to go to an Election of capital Burgesses. They made no Return to it in due Time; and thereupon a Side-bar Rule had been obtained, requiring them to make one. No Obedience had been paid to that Rule; and thereupon a Rule was obtained to shew Cause why an Attachment should not go against them. The Mayor and four of the Capital Burgesses had been served with this Rule, and now their Time was come for shewing Cause. Mr. Willes was Counsel with these five Persons, and submitted it, that this Rule should be discharged, by Reason that no Affidavit was produced of Service of the Writ of Mandamus at the Time the Side-bar Rule was obtained; at least he said he hoped it should be enlarged, till all the rest of the Members of the Corporation were served with this Rule for shewing Cause why there should not be an Attachment, as well as these five. Mr. Strange was of Counsel of the other Side, and said that he had an Affidavit in his Hand, of Service of this Writ of Mandamus upon these five Members; and it is not usual to produce such Affidavit at the Time these Side-bar Rules are moved for, or even when such Rule is moved for in Court; it is always thought to be enough that the Affidavit is produced when called for, at the Time for shewing Cause why there should not go an Attachment. And as to the Rule for shewing Cause for the Attachment being now desired to be made absolute upon an Affidavit of Service of the Rule to return the Writ upon these five Members, he said it was very just and reasonable. For the Presence of these five Members is necessary, in order to hold a corporate Assembly; the rest of the Corporate Body did meet in Pursuance of the Mandamus, and were desirous to have obey'd it; but for want of the others attending, nothing was or could be done. The Court in general agreed, that where a Mandamus is served upon all the Persons to whom it is directed, and where an Attachment is desired against all the Persons to whom the Mandamus is directed, it is enough to produce an Affidavit of Service of the Mandamus, at the Time for shewing Cause upon the Attachment; neither is the Affidavit even then necessary to be produced, unless the other Side calls for it. But in the present Case, where it appears that the Mandamus is only served upon some of the Members, and an Attachment is only desired against these in particular, Judge Lee declared that he thought these particular Members ought to have an Opportunity of answering this Affidavit of the special Service of the Mandamus on them in particular. Accordingly the Rule was enlarged a few Days for this Purpose.

Charleton and Bancroft.

How far the Court will make a Rule upon a Person to nonpross his Writ of Error at his own Expence, by Reason of his having brought it contrary to his own Agreement.

MR. Agar had obtained a Rule a few Days ago, that the Plaintiff in Error should nonpross a Writ of Error in Parliament at his own Expence, which he had brought upon a Judgment of this Court against his own Agreement. Mr. Abney now moved, that the Court would set aside an Execution, which the Plaintiff in the Original Action had made after this Writ of Error was brought, and before the other Rule was obtained. And accordingly the Court made a Rule to shew Cause. Vide postea.

The King and Jeffs.

How far a Person may change his Attorney, or not, without the Leave of the Court.

IN an Indictment of Barretrey against the Defendant, Mr. Strange moved, that the Trial might be put off for a few Days, which the Defendant had given Notice of for the sittings after Term, by Reason that the Prosecutor had for some Reasons changed his Attorney, and at present was not able to get the Papers relating to this Cause out of the Hands of his former Attorney. Judge Page said, that a Man cannot change his Attorney but by Rule of Court. Mr. Strange agreed he could not in Civil Actions; but in Indictments he said he might. However, as there was no ill Practice assigned in the Attorney as a Reason for his being changed, the Court refused the Motion.

The City of London and Sir Fisher Tensh.

The Certainty which is required in declaring in an Action of Covenant.

IN an Action of Covenant the Plaintiffs declared, that in Pursuance of the Statute made 5 & 6 W. & M. 10. (5). they granted a Licence by Indenture to Sir Thomas Garrard and Sir Fisher Tensh, for creating Lights within the City, during a certain Term not yet expired; and that in Consideration thereof Sir Thomas Garrard and the Defendant covenanted that they or their Assigns would pay to the Plaintiffs the Sum of 400 l. every Year at the Feast of St Michael. The Plaintiffs alledged, that Sir Thomas Garrard died on such a Day, and that since his Decease there was the Sum of 800 l. due for two Years de redditu prædicto at the Feast of St. Michael last past, which said Sum of 800 l. he ought to have paid at that Day, but did not, to the Plaintiffs Damage, &c. The Defendants by their Plea demand Oyer of the Indenture, and then demur specially, and shew for Cause first, that the Plaintiffs have not alledged, that neither the Defendant nor his Assigns did pay this Money at the Day; secondly, that the Plaintiffs alledge that 800 l. was due de redditu prædicto, whereas this is no Rent; Thirdly, That the Words of the Declaration are, Which said Sum of 800 l. the Defendant ought to have paid at that Day, whereas 400 l. only was the yearly Payment, and therefore

for 400 l. only could be said to be due at that Day. In Support of the first of these Objections he cited 3 Cro. 348. Salk. 139. 5 Mod. 133. And in Support of the second, he cited Browning's Case in Plow. 131. He said farther, that the Indenture set forth in the Declaration varied in many respects from the Indenture set forth upon Oyer; and as those Variances might have been taken Advantage of at the Trial upon Non est factum, he submitted it, they might be taken advantage of equally upon a Demurrer, though they are not specially assigned for Cause of it. The Common Serjeant was of the other Side, and desired a Day to answer these Exceptions, which accordingly the Court gave him. Vide postea.

Jury and Goodwright.

UPON a Writ of Error on a Judgment in the Common Pleas, M^r. Parker was offering to take an Exception to reverse the Judgment, but M^r. Fazakerly on the other Side objected that the Defendant in Error had delivered all the Paper Books, and therefore submitted it, that the Plaintiff in Error was not intitled to be heard; accordingly prayed that the Judgment might be affirmed. M^r. Parker upon that offer, ed now to pay for them. The Master informed the Court, that the Practice of the Court of Common Pleas was to allow the Party to pay for them in Court as the Counsel is beginning to argue any Matter in the Paper; but in this Court the Practice is otherwise. Accordingly the Court directly affirmed the Judgment.

How far a Person may be allowed to pay for the Paper Book, at the Time the Cause comes on, or not.

Hughes and Winter.

IN an Action for Words the Plaintiff declared, that William Jennings made his Will in Writing bearing Date on such a Day, and that Anne Bolen, Anna Bolen and the Plaintiff were the three subscribing Witnesses, which Will they proved in the Prerogative Court; and in discoursing concerning the said Will, the Defendant spoke certain scandalous Words of the Plaintiff, which were set forth in the first and second Count; and in the third Count the Plaintiff declared, that the Defendant spoke the Words following; They, meaning the Plaintiff and Anne Bolen and Anna Bolen, or some of them forged the Will; and they are perjured, and I'll prove them so. To the two first of these Counts the Defendant pleaded Not guilty, and to this last demurred. M^r. Kettleby now argued in Support of the Demurrer, and said, that he apprehended the Words were not Actionable, by reason that it was uncertain, which of the three Persons the Words were spoken of. But the Court was of Opinion, that the first Words were only introductory to the second, and that the second contained a positive Charge of Perjury against them all. Accordingly gave Judgment for the Plaintiff.

How far Words shall be said to be Actionable, notwithstanding the Uncertainty indising the Persons whom the Words were spoken of.

Osborn and Oyle.

Construction
on the Sta-
tute of
3 Geo. 2.
which re-
quires, that
Law Pro-
ceedings shall
be in English.

IN a Writ of Error upon a Judgment in the Common Pleas, the Declaration was of Michaelmas last, and the Damages laid in it 25 l. Judgment by Default; and on the Writ of Inquiry but 9 l. 15 s. Damages given; yet the Proceedings were in English. *M.* submitted it, that they ought to have been in Latin, according to the Resolution which the Common Pleas have been of in like Cases. For which Reason the Court ordered this Matter to stand over, till the Court was full. *Vide postea.*

Russel and Pindel *against* Stephens.

When a Per-
son is taken
upon an At-
tachment
out of the
Court of
Chancery,
and a Bail-
Bond is given
upon it, how
far such Bail-
Bond shall
be said to be
good, or not.

IN an Action upon a Bail-Bond the Defendant prayed Oyer of the Bond and Condition; then by his Plea set forth the Statute of 23 H. 6. and averred, that the Bond was given by him for Ease and Favour of one Joshua Draper, or to be discharged from his Imprisonment. The Plaintiffs by their Replication set forth, that an Attachment issued out of Chancery against one Joshua Draper in a certain Suit there at the Instance of a private Person, that thereupon the said Joshua Draper was arrested, and for his Deliverance the present Bond was given; absque hoc, that it was given for Ease and Favour of the said Joshua Draper, or to be discharged from his Imprisonment. To this Replication there was a Demurrer, and the Causes specially shewn, that the Traverse contains Matter uncertain and untraversable, and that the Plaintiffs have not sufficiently averred their Traverse. *M.* Filmer now argued in Support of the Demurrer; and said, that though the Conclusion of the Defendant's Plea was in the Words of the Plaintiffs Traverse; yet it contained in it double Matter and was uncertain; and therefore the Issue ought to have been joined in such a Manner as that the Traverse should have been of such Matter only, as should have made it single, and likewise certain. He submitted it farther, that the Traverse was not sufficiently averred; for it is in the singular Number & hoc paratus est verificare, whereas it ought to have been in the Plural, by Reason that there was two Persons joint Plaintiffs; so for the same Reason the Beginning of the Replication was bad likewise, for it is ab actione sua præcludi non debet. For which Purpose he cited the Case in Lut. 1529, and the Case of The Queen and Ingram, Trin. 11 Anne. There two were indicted for an Assault and Battery; in Arrest of Judgment it was moved, that the Indictment was uncertain, it being insultum fecit & verberaver'. The Court held they could give Judgment for the Battery, by Reason of the Word verberaver'; but Lord Macclesfield agreed it was bad for the Assault. He observed farther the Bond set out upon the Oyer varied from that set out in the Declaration; for in the Declaration it is alledged, that the Defendant was bound by the Name of George Stephens, Mercator in Holbourn in Com' Mid';
I
whereas

whereas upon the Oyer, the Words in Com' Mid' are omitted. But besides these Exceptions, which went to the Form only of the Proceedings, he submitted it, that the Bond was void, as being against the Statute of 23 H. 6. for as he apprehended, no such Bond could be taken upon an Attachment; and for this Purpose cited 3 Leon. 208. 2 An. 122. and the Case of Beel and Watford, Mich. 4 Geo. 1. in the Court of Common Pleas. There Mugg was taken upon an Attachment, wherein was the very same Form of Words as in the present one, to answer such Matters as should be objected against him; a Bail-bond given upon that, and the Court held it to be void. Mr. Agar on the other Side cited Dy. 364. Salk. 608. to shew that the Bond was legal. And Judge Page said he remembered in the Exchequer a Man was held to be bailable upon it. However as this Cause was too special for the last Paper-Day, it stood over.

Anonymus.

MR. Abney moved for an Information against Mr. Ekyns, How far a
Rector of the Parish Church of Waiton, and against Mr. Parson is not
Bonner, Curate of the same Church, for refusing to give Mr. obliged to
Dormer Copies of certain Parts of a Register belonging to make out a
that Parish, and likewise for refusing to give him a Certificate Copy of a
of certain Persons of the Family of the Dormers being born in Register.
that Parish. He said that an Ejectment was depending in this
Court at the Time this Refusal was made, and still continues
to be so, between Mr. Dormer and Mr. Parkerson and his Wife,
concerning certain Lands which the Plaintiff claims as Heir
Male of the Dormer Family. Several of that Family were
born in the Parish of Waiton; and for this Reason it was ne-
cessary to have Copies of several Parts of the Register, and
likewise a Certificate of the Birth of many in that Family.
Accordingly Mr. Dormer made his Application to the Rector and
Curate of this Parish for this Purpose; and offered to pay
him for them; but they refused letting him have them; and
the only Reason which they gave for this Refusal was, that
Mr. Parkerson and his Wife were the Defendants, and they
would do nothing to their Prejudice. Of this Fact he said he
had an Affidavit; and for such an extraordinary Denial of Ju-
stice, he hoped the Court would grant an Information. The
Court said, you have a Right to inspect the publick Books of
the Parish; but cannot oblige the Rector or Curate to make you
out either Copies of those Books, or a Certificate; for which
Reason they could not grant the Motion. Upon this he changed
his Motion, and desired a Rule to inspect those Books. The
Court said, Motions to inspect the publick Books of Corpora-
tions they grant without an Affidavit; but in Motions to in-
spect the publick Books of a Parish, an Affidavit is always re-
quisite. By such Affidavit they said too, it must be sworn, that
the Copies of them are necessary to be produced in Evidence at
a Trial of a Cause depending, and likewise that the Inspection
of those Books to take Copies has been demanded and refused.
Now in the present Case, the first Part was sworn to; but not
the

the latter; for which Reason the Court refused to make any Rule at present.

Pit and Still.

How far the Court will not give Liberty that a Judgment shall be amended.

ON Motion to amend a Judgment entered Mich. 5 Geo. 2. upon a Warrant of Attorney, it was said, the Judgment was entered up, Ideo consideratum est quod Joannes Pit, whereas his Christian Name was William. The Counsel observed that the Declaration was right, and so was the Bill upon the File. Judge Probyn said that Judgments are never amended but in the same Term which they are entered up of; but in Declarations and all other Matters, he agreed the Rule was otherwise. Accordingly the Motion was refused.

Anonymus.

When a Suit is instituted in the Ecclesiastical Court, in order to have the Benefit of a Legacy how far the Courts of Common Law will not grant a Prohibition, but will leave the Party to his Remedy by way of Appeal.

A Residuary Legatee libel'd in the Court of Arches against two Executors for his distributive Share in the Effects of the Testator. The Defendants each of them appeared separately, and gave in separate Inventories. Notwithstanding this the Judge of the Ecclesiastical Court sentenced one of the Defendants to pay to the Plaintiff more than ever came to his Hands according to the Inventory. Upon this, this Defendant put in a Suggestion, in order for a Prohibition, and thereby farther alledged that a Note which he had charged himself with in the Inventory was given by him to the Testator so long ago as 1723, and thereby was barred by the Statute of Limitations. Mr. Wynne now moved that a Prohibition might be granted him; he said it was a known Rule, that in Respect of a Legatee, the one Executor shall answer no farther than Assets come to his Hands; though perhaps in Respect of Creditors he may be answerable possibly even for what comes to the Hands of him, who is Co-executor with him. If this be so, he said, the Sentence against the present Defendant was manifestly unjust. It was a known Rule too, he observed, that the making a Debtor Executor, was a Discharge of the Debt; if the Ecclesiastical Court will not allow such Discharge, he submitted it, that was a sufficient Cause for a Prohibition. Like the Case of their not allowing a Release to be proved by one Witness, or of their allowing that to be Evidence, which is not Evidence by Law. Judge Probyn agreed the two Instances put; but he with the rest of the Court was of Opinion, that the present Matter was Matter of Account only; the spiritual Judge was proper to determine, whether this Defendant ought to be charged with the Note, or whatever other Matter he ought to be charged with. For which Reason the present Motion was refused, and the Party left to his Remedy by way of Appeal.

Turner and Moreton.

THIS was a Declaration of Mich. Term last, wherein the Damages were laid to 20 Pounds, but the finding of the Jury under 10 Pounds. The Proceedings were all in English. *Mr. Kettleby objected, that they ought to have been in Latin; and for this Cause moved in Arrest of Judgment. He did agree, that most of the Exceptions, that had been taken of this Sort, had been the other way; but as the Court had not yet come to a Resolution concerning what Construction the Statute of 5 Geo. 2. ought to receive, he submitted it, the Court would make a Rule to shew Cause, which accordingly they did. Vide Postea.*

Construction on the Statute of 5 G. 2. which requires that Law Proceedings shall be in English.

The King and Crisp.

THE Defendant having been brought up by Habeas Corpus, it appeared upon the Return, that he was committed to the County Gaol of Surrey, for Robbery upon the Highway; and now *Mr. Burnet* took several Exceptions to the Commitment. The Commitment he said was by *Mr. Nichols*, a Justice of Peace; but it is not set forth in the Commitment that he was a Justice of Peace for the County of Surrey, and therefore his Authority is not shewn, which he had to commit to the Gaol of that County. For this Purpose he cited 2 Inst. 52. His second Exception was, that it does not appear by the Commitment, that the Prisoner was ever brought before the Justice; so that he might have made out his Commitment in his Absence, and this, he submitted it, was against the Intention of the Statute of 1 & 2 P. & M. 13. (4.) Thirdly, he objected, that the Time is not set forth, when the Robbery was committed, which it ought to have been, as appears by Rol. Rep. 192, 218. In the last Place he objected, that the Place was not set forth, where the Robbery was committed, which ought to have been; because if it was supposed to be committed in Middlesex, the Prisoner would be intitled to take his Trial at the Old Bailey; which would be sooner over than any Trial can be at the Assizes. And this, he submitted it, was within the Intention of the Habeas Corpus Act in King Charles the Second's Time. He said farther, that he had several Affidavits, containing very strong Circumstances, to shew that the Prisoner did not commit the Fact; for which Reasons he hoped he should be discharged, or at least be bailed. Accordingly the Court made a Rule to shew Cause, why he should not be bailed. The Cases cited to shew that Prisoners have been bailed in such Instances were, Latch 12. Sir Tho. Jones 322. Ven. 63. Salk. 104. and 5 Mod. 323. Vide Postea.

When a Person is committed for Felony, how far the Court will bail him by Reason of Defects in the Commitment.

The King and The Justices of Shrewsbury.

When an Information is moved for against a Justice of Peace, what shall be said to be sufficient Notice of such Motion.

ON Rule to shew Cause why an Information should not be granted against the Defendants; Mr. Fortescue said, that the Justices had not Notice given them of the Motion, at the Time the Rule for shewing Cause was applied for; and therefore in Point of Form he submitted it, that it ought to be discharged. Mr. Fazakerly on the other Side said, that there had been a former Rule made for shewing Cause why this Information should not be granted; and at the Time that Rule was moved for an Affidavit of Notice was produced. That Rule was discharged merely upon an Exception taken to the Affidavits, that the Commissioner whom they were sworn before, was Attorney in the Cause. For this Reason he apprehended, that the Notice which the Justices have had, is sufficient; accordingly the Court was of the same Opinion. Upon this Mr. Fortescue said, that the Substance of the Charge against the Defendants was in the Manner following. A Poor's Rate was made by the Churchwardens and Overseers of one of the Parishes in this Town, and signed by two Justices; but at the Sessions for the Town, which were held the 6th of October last, the Rate was quashed. At the same Time the Court of Sessions quashed this Rate, they made an Order upon the Churchwardens and Overseers to make another by the 24th of that Instant, or else that they would make one themselves at that Time. For this Purpose they adjourned the Sessions to a Place called the Erchequer in that Town, where the publick Accounts of the Town are generally settled at; and this Adjournment they gave Notice should be on the 24th of that Instant before mentioned. Accordingly four of the Justices met at the Erchequer at the Time appointed; they there opened their Sessions; and because the Churchwardens and Overseers had not made a new Rate within the Time given them, they made one themselves; and in that new one left out ten Persons that were put into the old one; and put in several Persons that were not in the old one. By the Custom of this Borough, every one that is rated to the Poor, has a Right to vote for Members of Parliament to represent it; and it was sworn by the Affidavits, which the Rule for shewing Cause was made upon, that it was believed, the putting these ten Persons out of the new Rate was done with an Intention to hinder them from voting at the next Election. This, Mr. Fortescue said, was the Nature of the Fact charged upon the Defendants; and the Complaint arising from it, consists of two Particulars; first, that the Justices in their Sessions have no Authority to make a new Rate; Secondly, admitting they have such Power, that still they ought not to make Use of it in such a Manner, and with such Designs, as to defeat any of the Inhabitants of their Right of voting at an Election. To the first of these Points he submitted it, that the Justices had no such Power; and for this Purpose cited Salk. 483. To the second he had an Affidavit from all the Justices, that the old Rate was not a suitable one, and that the new one,

to the best of their Judgments, was in all respects fit and just. He did agree, that there were no Negative Words in this Affidavit, that the new Rate was not made with a View to the next Election; but whatever the View was, he submitted it, that as the Rate was sworn to be fit and just, the Court would not inquire into this Matter any farther. Mr. Fazakerly argued on the other Side, and said, that no Rule was better established, than, where an Appeal is given to the Sessions, the Application to them cannot be made in the first Instance. The Reason of which is, that if such Original Application was allowed, the Appeal of the Party would be taken away, which would be a manifest Injustice. He submitted it therefore, that the inserting those Persons into the new Rate, which were not in the old one was notoriously illegal. This of itself was sufficient Cause, he said, to have the present Rule made absolute. But as it is not denied neither, that this Alteration was made with a View to influence the next Election, he submitted it, that was a farther Reason, why this Matter ought to receive a stricter Examination. The whole Court declared their Opinion, that the Appeal to the Sessions by any particular Person, who was included in the Rate, laid the whole of the Rate open to the Inquiry of the Sessions; and when they had the Rate before them, they thought the Sessions had full Authority to make what Alteration in the old Rate they thought proper, and thereby make a new one. Otherwise Judge Page said, if they should quash the old one, and make no new one, the Poor in the mean Time would be left starving. At least the Court said, they would not determine a Point of Law of this Nature against the Justices upon an Information. If what the Justices have done is illegal, Judge Page said the Party has his Remedy open against them by Indictment, or by bringing an Action against them for so much Money had and received to the Party's Use, as they have levied by this Rate. Accordingly the Rule was discharged.

The King and The Inhabitants of Brackley St. Peters in the
County of Northampton.

MR. Fazakerly came now to shew Cause, why an Order of ^{Vide ante} Sessions should not be quashed, which was made upon an ^{228.} Appeal from an Account delivered in by the Church-wardens of this Parish. The first Objection to this Order was, that it is recited, whereas the Complainants did lodge an Appeal at the last Quarter-Session; but it does not appear, that the Proceedings upon the Appeal at that Sessions were adjourned to this Sessions; so that there was a Discontinuance. To this Mr. Fazakerly answered, that he did agree, in those Instances, where an Appeal is necessary to be made at the next Quarter-Sessions, the Adjournment of the Proceedings must appear in the Recital; for otherwise the Justices at the second Sessions do not shew, that they have any Jurisdiction. But in the present Case by the Statute of 43 Eliz. 2. (6). the Appeal may be made

at any Time; and therefore, as he apprehended, the Adjournment of the Proceedings need not be set forth in the Recital. The second Objection was, that the Time when the first Sessions was held did not appear; which, it was said, was necessary; because the Appeal is given only to the Quarter Sessions; and the Times for holding those Sessions are fixed by Act of Parliament. To this he answered, that the Time for holding the present Sessions expressly appears; for it is said to be held on the 18th of April 1732, and the first Order is recited to be made at the last Quarter Sessions; which, he submitted it, was sufficiently certain. The third Objection was, that the Accounts of Church-wardens as such are not subject to the Examination of the Sessions, though the Accounts of Overseers are. To this he answered, that by this Statute the Church-wardens are made Overseers; and it shall be intended, that this Account of the Church-wardens was in that Capacity. The fourth Objection was, that the Appeal would not lie to the Sessions from the Accounts of these Officers in the first Instance; but the Application ought first of all to have been to particular Justices. To this he answered, that the 6th Sect. of 43 Eliz. gives the Appeal either from the Act done by the Overseers or from the Act done by the particular Justices, according to the Party's Election. The last Objection, that was much relied upon, was, that the Complaint to the Sessions arose from one particular Disbursement chiefly of 11l. and 5d. in the Prosecution of a Law-Suit; and this Disbursement the Justices have ordered to be struck out of the Account. Now it was insisted upon, that the Justices have no Power to order an Account to be defaced in that manner. To this he answered, that the Meaning of this Expression only was, that this Sum of Money should not be allowed the Officers in their Account. The Court thought that these Objections required some Consideration; for which Reason this Matter was ordered to stand over. *Vide postea.*

Charleton and Bancroft.

Vide ante
266.

MR. Abney moved now, that the Rule for setting aside the Execution might be made absolute. Mr. Agar opposed it; because the Execution was executed on the Monday after the Rule was made for nonprossing the Writ of Error, and the Plaintiff in Error was present in Court at the Time that Rule was obtained. However the Court said, inasmuch as the Writ of Error was not actually nonpros'd at the Time of the Execution, the Execution was certainly irregular; accordingly made the Rule absolute. And in this Case Judge Page said, that a Writ of Error is a Superfedeas not from the Sealing of it, but from the Allowance of it.

Darbey and Gould.

MR. Fazakerly informed the Court, that the Postea in this ^{Vide ante} Case was lost by some unavoidable Accident, and said, that he had an Affidavit to produce, that the Record of Nisi prius agreed with the Roll; for which Reason he moved, that the Plaintiff might have Liberty to make up a new Record of Nisi prius agreeable to the Roll. The like Motion he said was allowed in Ven. 92. in the Case of King qui tam and Bolton, Hil. 5 Geo. 1. and in that of Needham and Grenham, Trin. 9 Geo. 1. Accordingly a Rule was made to shew Cause. *Vide postea.*

The King and Pixley.

THE Defendant having been brought up by Habeas Corpus, ^{Vide ante} Mr. Marsh moved, that he might be bailed, the only Com- ^{143.} mitment returned upon it being upon 6 Geo. 1. 21. The Attorney General opposed it; because since the taking out the Habeas Corpus the Prisoner has been charged with other Commitments upon the Statute of 8 Geo. 1. 18. (6). which makes this Offence of opposing Custom-house Officers in the Execution of their Office in some Circumstances Felony. The Court said those other Commitments must be returned upon the Habeas Corpus, otherwise they cannot take Notice of them; and accordingly gave Leave, that the Return might be amended in this Respect whilst the Court was sitting. The Attorney General came into Court again soon after, and said that he was afraid the amending this Return would be to little Purpose. For the Habeas Corpus is directed to Mr. Bence High Sheriff of the County of Suffolk to bring up the Body of this Pixley; now the Commitment that is returned, is the only Commitment that the Prisoner is charged with in his Custody. This other Commitment for Felony was made by a Justice of Peace for the Borough of Ipswich only, and that Commitment was directed to the Keeper of the Gaol for that Borough. Under this Commitment the High Sheriff has nothing to do with the Prisoner; though the Fact happens to be, that one and the same Prison serves both for the County at large and this particular Borough, and the same Person is Gaoler in both Capacities. For which Reason, he submitted it, that the Court would order the Prisoner to be remanded at present, in order that a new Commitment may be made out by the Justice of Peace for the County at large upon this Statute of 8 Geo. 1. and that then this new Commitment may be added to the Return. Judge Page said, that he never knew a Prisoner remanded for such Purpose as this. Upon this the Attorney General said, that upon this Habeas Corpus the Prisoner could certainly not be intitled to be discharged out of the Gaoler's Custody. The Prisoner ought to have obtained two Habeas Corpus's, one to the Gaoler as Keeper of the Gaol for the County at large; another to him as Keeper of the Gaol for this particular Borough. *Pe*

He said too, that he had not sufficient Notice given him of the Bail. Accordingly the Court ordered the Prisoner to be remanded. Vide postea.

Fitch and Goddard *against* Still.

MR. Hussey now moved this Matter again, and cited 3 Cro. 865. Hob. 327. Ven. 217. and Raym. 39. to justify the Amendment. Accordingly the Court made a Rule to New Cause.

The King *and* Crisp.

Vide ante
271.

MR. Burnet now moved to make the Rule absolute. He said, in the Examination taken by Mr. Nicholas, the Justice of Peace who made the Commitment, it was sworn that two Persons joined in committing this Robbery, one of which was the Prisoner. Now he had since the last Motion got other Affidavits, whereby it was sworn, that two other Persons had been committed for this very Robbery, and that they had confessed the Fact. The Court accordingly ordered these Affidavits to be read, and upon the whole Matter admitted the Prisoner to Bail. He himself was bound in a Recognizance of 200 l. and four other Persons justified themselves each in the Sum of 100 l.

Leehill *and* Sir Thomas Reynolds.

Vide ante
253.

THIS being an Action of Covenant upon an Indenture, of which the Defendant had a Counterpart, the Defendant did not demand Oyer of the Plaintiff, but set out the Oyer himself according to the Counterpart of the Dced, and then demurred to the Declaration. A few Days ago Mr. Hollins obtained a Rule to shew Cause, why this Demurrer should not be set aside. Mr. Marsh came now to shew Cause, and submitted it, that by the Practice of the Court where there are Counterparts of Dceds, the Defendant has this Privilege of setting out Oyer according to his Counterpart, and if he sets it out Wrong, on Complaint to the Court they will set it aside. But in the present Case there was no Pretence to say, that the Oyer was set out untruly. He observed farther, that was a general Demurrer to the Declaration, and therefore, admitting that it was wrong, he apprehended the Court would not set it aside upon Motion. The Master informed the Court, that he knew of no such Practice; and the Court said they took the Oyer set out to be manifestly irregular; accordingly made the Rule absolute.

Anonymus.

A Motion was made for an Attachment against a Man for practising as an Attorney in the County Court, not being regularly admitted according to the Statute of 2 Geo. 2. The Court said, if this Man had practised in their Court, it would have been a Contempt in him, and they should have granted an Attachment; but as he has practised in another Court, it is only a Contempt in him to that Court. For which Reason they refused the Motion, and left him to be prosecuted for the Penalty, as the Act directs.

When a Person practices as an Attorney in an inferior Court, without being qualified according to 2 Geo. 2. how far the superior Courts will not grant an Attachment against him.

Term. Mich. 6 Geo. 2. 1733.

Beech and Johnson.

THIS Matter coming on again the Case of Gardiner and Merret was cited, where the Court amended such Writ of Error Ex Officio; accordingly they did so in the present Case. Ex relatu. Vide ante 186.

Washer and Smith.

THIS Matter coming on again, Mr. Marsh cited 2 Ven. 195. and Mr. Filmer cited 2 Ven. 180. The Court was clearly of Opinion, that in the Case where de son assault demesne is pleaded, the Plaintiff is intitled to his full Costs, provided he has a Verdict. But Judge Lee said, that the Rule is not, that the Plaintiff shall be intitled to full Costs in all these Actions of Trespass, where there is special Pleading: and particularly cited the Case of Philpot and Jones, Hil. 1 Geo. 1. In Trespass there for breaking the Plaintiff's House, the Defendant justified as Bailiff under Process; the Plaintiff replied, that his Doors were shut; upon which Issue was joined; Verdict found for the Plaintiff, and Damages 2d. Motion was in that Case for full Costs; but the Court refused it. Ex relatu. Vide ante 180.

Baily and Colebourn.

Vide ante.
263.

MR. Lacy came now to shew Cause, and said, that this Action was begun before the Time that the Act was made that has been mentioned. For which Reason it was pretty extraordinary to suppose the Legislature intended, that Part of the Record should be in Latin, Part in English. Besides he said, admitting that this Action had begun after the Act of Parliament, yet it would be very Mischievous, that the Event of a Verdict should determine, whether the Proceedings before were regular or not. But the Chief Justice said, that as to the first Objection he thought it had very little Weight with it, by Reason that there are Numbers of Precedents in the Treasury of Records that are Part Latin, Part English. And as to the second Objection, he said the Legislature must have intended something by the Act which they made. But if it should be in the Power of Plaintiffs to take their Case out of the Act, merely by laying their Damages above 10*l*. the Act would be wholly eluded. However this Matter was ordered to stand over. Ex relatu. Vide postea.

Term. Trin.

6 Geo. II. 1733.

Anonymus.

MR. Gapper moved for an Information against Churchey, for acting as Justice of Peace in the County of Somerset, without having a clear Estate of 100 Pounds per Annum, according to the Direction of the Statute of 5 Geo. 2. 18. The Court was of Opinion in the first Place, that the Affidavit which the Motion was made upon, was not certain enough; and besides if it had, they said, they should not have granted an Information for this Offence; because there is a Penalty given by the Act, for which an Action will lie; as Judge Lee said, an Information may be brought for that Penalty of Course, without the Assistance of the Court. Accordingly the Motion was refused.

When a Matter is forbidden by a Statute, and a Penalty given by it, how far the Court will not grant an Information, but will leave the Party to take his Remedy for the Penalty in the Manner which the Statute prescribes.

Langfield and Walmesly.

SBrjeant Cummins moved to stay the Plaintiff's Proceedings, there being no Cause of Action in the Writ; the Writ requiring the Defendant to answer the Defendant, and not the Plaintiff, such a Complaint. Accordingly the Court made a Rule to shew Cause; and afterwards on Affidavit of Service made it absolute.

How far the Court will stay Proceedings, by Reason of a Defect in the Writ which the Defendant was served with.

Shepherd and Crawford.

THE last Term Mr. Strange obtained a Rule for putting off a Trial in this Cause till this Term, by Reason of some of the Defendant's Witnesses being gone a Voyage to the West-Indies. Mr. Strange now moved upon the same Affidavits, that the Trial might be put off till next Term; and said that by the Rules of the Court upon one Motion, a Trial is never put off but for one Term. Accordingly a Rule was made to shew Cause, Vide postea.

How far the Court will give Leave that a Trial should be put off a second Time.

— against

— against Pether and Ling.

When Nul
riel Record
is pleaded,
what shall
not be said
to be a
Failure of
the Record.

IN Debt upon a Recognizance against Bail, the Plaintiff declared, that the Defendants John Pether and — Ling became bound in a Recognizance with Condition, that one James Cook should either surrender himself or should pay the Money that should be recovered against him. The Defendants pleaded Nul riel Record. And this being the Day given the Plaintiff to verify his Record, Mr. Marsh submitted it, that the Record produced varied from the Record which was declared upon; for in the Record produced John Pether is bound by the Name of John Pether of Batersley in the County of Surrey, Husbandman, whereas in the Record declared upon, there is no Addition at all; but only John Peter generally. Judge Page and Judge Probyn agreed that if the Addition had been inserted in the Declaration, and omitted out of the Recognizance, the Variance would have been fatal. But as it is, the Court was of Opinion, that it was no Variance; accordingly Judgment was given for the Plaintiff.

The King and Taylor.

Vide ante
238.

MR. Strange came now to shew Cause, and submitted it, that the Judgment of Ouster was warranted, as well as the other Part of it for fining the Defendant. He observed, that the Judgments in Actions were not variable, according to the Discretion of the Judge, but fixed and certain in all Cases. So fixed and certain he said they were, that if it should happen at any Time that they are entered up otherwise, even the Party himself, in whose Favour the Variation is made, may reverse the Judgment for that Reason. For this Purpose he cited Salk. 633, 511. Com. 277. and Skin. 524. In the present Information in Nature of a Quo Warranto, as well as in a Quo Warranto itself, he conceived, that the Judgment appointed by the Law was, that the Defendant should be ousted as well as fined; and the Defendant by confessing in one Part of his Defence, and justifying in the other, shall not alter the Form of the Judgment. He observed that if there was any Doubt of this at Common Law, the Statute of 9 Ann. 20. (5.) has made this clear beyond Question. The Words of the Act were indeed only, That the Court shall and may give such Judgment; but it is well known that those Words are always construed the same as must. The Case of The King and Pendar, Pasch. 10 Geo. 1. he submitted it, was very applicable to the present one. That was an Information against the Defendant in the Nature of a Quo Warranto, for executing the Office of Mayor of Penryn in the County of Cornwall. The Defendant justified, as being elected and sworn into that Office. The Jury found that he was elected, but not sworn. The Court was of Opinion in that Case, that Judgment of Ouster should be entered against him, which was done accordingly. Notwithstanding this, he obtained a

Mandamus

Mandamus to be sworn in. The Judgment of Ouster was returned to the Mandamus, and the Court held it to be a good Return. Two Writs of Error were brought upon these Judgments in the House of Lords; the first Judgment was affirmed; and the Court held that a Writ of Error would not lie upon the other; and accordingly the second Writ of Error was quashed. Some other Counsel of the same Side submitted it, that the Court never interferes themselves in giving Directions about entering up the form of the Judgment; but leaves the Party to enter it at his Peril. If he enters it wrong, the Superior Court will reverse it. They said farther, that this Judgment was entered up in Hilary Vacation; the Vacation is always considered as Part of the precedent Term; and yet no Application was made to the Court about amending this Judgment, till the first Day in Easter Term after. They submitted it to be a known Rule, that Judgments are never amended but in the same Term in which they are entered up; and therefore they hoped the Rule should be discharged. Mr. Wills argued on the other Side, and said he did agree that the Court will not direct the Party what Judgment he shall enter up; so far his entering up his Judgment is at his Peril; but yet he believed it was never imagined, but if the Party enters up a wrong Judgment, the Court will say that is not their Judgment, and will order another Judgment to be entered. To the second of these Exceptions he did agree, that in many Respects the Vacation is considered as Part of the Term precedent; but yet it would be very extraordinary, that this Fiction should deprive the Party of his just Right in applying to the Court the first Day in which he possibly could apply. The principal Question then, he said, would arise concerning the Form of the Judgment itself. Before the Statute of 9 Ann. he observed, it was far from being a clear Point, that Judgments of Ouster could ever be entered up in Informations in the Nature of a Quo Warranto. Lord Chief Justice Holt declared his Doubts of it often. To settle these Doubts, was the Statute of Ann. made. And in general he said he should agree that Judgment of Ouster must be entered upon them; but if such Judgment must be entered in the present Case, it must be taken for granted, that when once a Person exercises an Office without Authority, so long as he does so, he is incapable of having a rightful Election; if he is capable of it, the Form of the present Judgment must be wrong. And he observed, it was certain that Judgment of Ouster has not always been entered upon these Informations since this Statute. In the Case of The King and Hicks, Hil. 5 Geo. 1. the Defendant's Office determined before the Time for entering up the Judgment was come; and he was only fined for the Usurpation. So in Ejectments, if the Term runs out before the Time for giving Judgment, the Party may indeed take Judgment for the Damages, but cannot have Judgment for the Term, but upon first applying to the Court to enlarge the Term laid in the Declaration. And as to the Case of The King and Pendar, his Exercise of that Office was for the whole Time illegal, and therefore could not be resembled to the present one. Mr. Draper said too, that there were Instances to be produced of the Par-

ty's having distinct Judgments by severing in this Manner in his Justification, and for this Purpose cited 2 H. 7. 11. and 2 Roll's Abr. 124. Accordingly for these Reasons the Court in the present Case made the Rule absolute.

The King and Cotton.

Vide ante
261.

Serjeant Corbet and Serjeant Baynes came now to shew Cause upon this Rule. In Case of Convictions they did agree, that the Party must be summoned before he is convicted, and such Summons must appear upon the Face of the Conviction. But in the Case of Orders they submitted it, that the Rule of Law was otherwise. In Orders of Bastardy, as well as in Orders of Removal, they observed, it was well known, that it is seldom set out in the Order, that the Party was summoned; and the Order is never quashed for this Reason. In Orders of Removal the Parish, on whom the Order is made, in Fact is never summoned, nor does the Law suppose them to be so. A Warrant, they said, by Law can never issue, unless there is a previous Summons; and they apprehended, it would be a Matter of dangerous Consequence to have it once established for Law, that the Party must be summoned; for if so, he would always run away and leave the Child to be maintained by the Parish. But admitting the Court should be of Opinion, that in Striangles the Law did require a Summons or Warrant in these Cases; yet still they apprehended for such a meer Mistake in Judgment the Court would never grant an Information. Mr. Abney and Mr. Hayward argued on the other Side. They said, an Order was in itself a complete Judgment; and they conceived, that the Rule of natural Justice required, that no Man should have a Judgment pass against him, without having an Opportunity of being heard against it. They did agree, that no Summons need appear upon the Face of these Orders; but the Reason given by the Court in those Cases is, that it is meer Matter of Proceeding before the Justices, and they will intend there was one. Mr. Abney said he had looked upon his Notes of the Case of The King against Squire and Ellington, that was mentioned upon the former Argument; and he had taken the Fact to be in this Manner. One of those Defendants was Mayor, the other a Justice of Peace of the Town of Hartford. They had made a Conviction upon one Venables for keeping a disorderly Alehouse. This Conviction was removed up by Certiorari, and one Exception taken to it amongst others was, that it did not appear the Party was summoned. The Answer given to that Exception by the Court was, that they would intend he was summoned; and that Conviction was confirmed. After this an Information was moved for against those two Defendants Squire and Ellington upon Affidavits, that they had never summoned the Party; and the Information was granted. Judge Page and Judge Probyn said, that they believed it might be true, that the Party need not have a Summons sent him in these Cases for the Danger of his running away, if he had such previous Notice given

given him. But when a Bastard Child is born in a Parish (as it must be in all Cases before the Justices can at all examine into the Fact) and when Oath is made by the Mother of it, that such a one is the Father of the Child; they declared their Opinions to be, that then the Law clearly justified the Justice of Peace in issuing out his Warrant to apprehend the Party, and that it was illegal in the Justices to make an Order upon him, till such Warrant issued and returned. They said, they thought that natural Justice required this, and that if ever such Complaint should come before the Court again for a Justice's making an Order of Bastardy upon a Man, without giving him an Opportunity to be heard, they should certainly be for granting an Information. But as this was the first Time, that they had ever remembered a Complaint of this Sort to come before the Court; they thought the present Rule ought to be discharged. Judge Lee said, in Convictions he did agree it was necessary that the Party should have an Opportunity to be heard, before the Conviction is made upon him; and the Court requires, that it should appear upon the Face of the Conviction, that the Party had such Opportunity given him; but in the Case of Orders, or of Convictions for keeping an Alehouse without a Licence, which are in the Nature of Orders, he doubted whether this was necessary. The Reason why this must appear upon the Face of the Conviction, could not be, he said, because the Party has no Benefit of Appeal given him; for in those Instances where an Appeal is given by Act of Parliament, this must appear upon the Face of them. So that the true Reason, why in the Case of Convictions this must appear, and in the Case of Orders this need not, he took to be, that in the one Case it was necessary, in the other Case it was not. As to the Case of The King against Squire and Ellington, he took it, that the Reason, why the Information went against them, was, because they had set out in the Conviction, that Venables was summoned, whereas in Fact he was not. And so Mr. Strange and Mr. Masterman said, that they remembered that Case was. Accordingly the Rule was discharged.

The King *and* Butler.

MOTION was made for a Certiorari to remove up some Orders of Sewers, and Affidavits were produced, that the removing them could be of no Prejudice. But, because there was not likewise an Affidavit of Notice of the Motion given to the Commissioners, the Court refused to make even a Rule to shew Cause.

How far Notice must be given to the Commissioners of Sewers before the Court will make even a Rule to shew Cause.

Rule to shew Cause why a Certiorari should not be granted to remove up an Order

Anony-

Anonymus.

How far an Information cannot be moved for against a Mayor, unless Notice is given of the Motion.

ON Motion for an Information against the Mayor of Esham for not holding a Court-Leet and Sessions of Gaol-Delivery in Pursuance of the Charter, Judge Probyn said, that the Mayor was a Justice of Peace by the Charter, and therefore Notice ought to be given of the Motion. Mr. Lacey agreed it, if the Information had been moved for against him for any Omission of his Duty as Justice of Peace; but as it is for an Omission of his Duty in his publick Capacity as Mayor, he submitted it to be otherwise. However the rest of the Court concurred with Judge Probyn; accordingly the Motion was refused.

Homes and others *against* Mendes Cæsars.

When an Affidavit is made in Order to hold a Defendant to special Bail, how far such Affidavit shall be said to be certain enough, or not.

IN an Action brought by the Plaintiffs as Assignees of a Commission of Bankruptcy, Mr. Strange moved, that the Defendant might be discharged out of Custody upon Common Bail, the Affidavit, on which he was held to Special Bail, being not certain enough. The Exception taken to the Affidavit was, that the Plaintiffs had only sworn that the Defendant was indebted to them in the Sum of 678 l. as appeared to them by the Books of the Bankrupt. He said the Court granted the like Motion last Term in the Case of Innys and Sinclair. Accordingly a Rule was made to shew Cause. Vide postea.

Trevilcock and Harvey.

For what Errors a common Recovery shall be reversed.

ON Writ of Error to reverse a Common Recovery, the Error assigned was, that the Toucher died between the Teste of the Summons ad Warrantizandum and the Return. Mr. Agar, Sen. was of Counsel with the Plaintiff in Error, and no Body on the other Side. Accordingly the Court reversed it.

Richardson and Roynes.

How far the Court will direct that certain Counts shall be struck out of a Declaration, by Reason of their being unnecessary.

IN an Action upon the Case the Plaintiff had laid in his Declaration seven Counts, some for Business done as an Attorney, others for Money lent; but four of them were exactly to the same Purpose with the other three; upon which Mr. Draper moved, that those four Counts might be struck out of the Declaration. Accordingly the Court made a Rule to shew Cause, and afterwards it was made absolute.

Weel and Smith.

MR. Agar moved to set aside an Execution, for its being taken out after a Writ of Error quod coram vobis allowed; and likewise for its being sued out by a wrong Name. The Court accordingly made a Rule to shew Cause. But Judge Lee said, it deserved to be considered, whether a Writ of Error quod coram vobis was a Superfedeas till Bail given. Vide postea.

How far a Writ of Error quod coram vobis shall not be said to be a Superfedeas till Bail is given to it.

Anonymus.

ON Motion for a Prohibition the Libel was produced signed by the Deputy-Register; but Judge Page doubted, whether there ought not to have been an Affidavit of its being a true Copy. M. Munday said, that the Course of the Court was to allow such Copy of a Libel without an Affidavit. Accordingly a Rule was made to shew Cause.

When a Prohibition is moved for, how far a Copy of the Libel signed by the Deputy Register without an Af-

fidavit that it is a true Copy, shall be sufficient to be laid before the Court above without an Af-

The King and The Inhabitants of Worcesterston.

THESSE same Orders, which the Court had been of Opinion before were bad, but that they were not properly before them by Reason of the Defect in the Certiorari, were now removed up again by a proper Certiorari. M. Wirley submitted it, that the Court would not allow these Exceptions to be argued again, and therefore that the Orders should be quashed without making a Rule to shew Cause. The Court said these Orders are removed by a new Certiorari, and therefore they must make a Rule to shew Cause, which they accordingly did.

Vide ante 247.

Damon and Jollieffe.

MR. Bancks moved to change a Venue from Hampshire to Dorsetshire, upon an Affidavit that the Cause of Action arose in Pool, which is a Town and County of itself, and Part of Dorsetshire. He agreed, that by the Rules of the Court it could not be removed to Pool; but submitted it, that it well might into the County at large. The Court made a Rule to shew Cause; but said, that a Town and County is no Part of the County at large; and therefore they should not make it absolute, but upon Consent. Vide postea.

When a Cause of Action arises in a Place that is a Town and County of itself, how far the Court will not change the Venue into the County

and County, next adjoining, notwithstanding they cannot change it into the Town

Martin and Mutfield.

When a Writ of Error is brought, in order to reverse an Outlawry, how far the Court will reverse it, notwithstanding the Plaintiff in Error does not appear to the original Action.

UPON a Writ of Error brought to reverse an Outlawry, Mr. Dennison moved, that the Plaintiff in Error might appear to the original Action, and that in the mean Time, Proceedings in this Writ of Error should be stayed. Where a Writ of Error is brought to reverse an Outlawry for Want of Proclamations, he observed, that such Appearance was requisite by the express Words of the Statute of 31 Eliz. 3. before the Writ of Error shall be allowed. The Statute of 4 and 5 W. & M. 18. provides generally concerning the Reversal of Outlawries, upon any Exception whatsoever; and by the Authority of Carth. 459. Bail must be given to the original Action, upon bringing the Writ of Error. Mr. Strange on the other Side said he did agree, that the Plaintiff in Error must appear to the original Action before the Outlawry shall be reversed; but he conceived there was no Reason why the Plaintiff should not proceed, in order to reverse it, without entering such Appearance. In Cases of Orders of Bastardy removed up by Certiorari, he did agree the Court will not quash the Order, till the Party enters into a Recognizance to appear at the Sessions; but yet he said it is well known that the Party may take his Exceptions to the Order, and have the Opinion of the Court upon them, before he enters into such Recognizance. The Court were of the same Opinion; accordingly the Motion was refused. Vide postea.

Hust and —.

How far the Court will not set aside a Plea of Outlawry, by Reason that it is pleaded in Bar.

IN an Action upon the Case for Goods sold and delivered, the Defendant pleaded Outlawry of the Plaintiff, and concluded his Plea in Bar, but did not plead the Outlawry sub pede sigilli. Mr. Field moved to set this Plea aside; but the Court refused the Motion, because the Outlawry was pleaded in Bar.

Shepherd and Crawford.

Vide ante. 279.

MR. Field shewed now for Cause, that the Defendant had not paid the Costs, which the Court directed to be paid on putting off the Trial before. Mr. Strange said, that by the Rules of the Court the Plaintiff ought to have delivered a Bill of Costs, and to have gone before the Master to get it settled, neither of which he had done; accordingly the Rule was made absolute.

The King *and* Fuller.

THIS was a Conviction which came on in the Paper, for selling Brandles and other distill'd Liquors without Licence. Mr. Draper observed that there was three Statutes which related to this Matter; one, that of 12 and 13 Will. 11. (18.) another, that of 1 Ann. 14. and a third, that of 2 Geo. 2. and to this Conviction he begged Leave to take several Exceptions. First, that it is not said in whose Behalf the Complaint was made, whether in Behalf of the Poor of the Parish, or in Behalf of the Informer himself; and the Penalties given by the Acts are distinct in these Cases, viz. 50 Pounds, if the Complaint is in Behalf of the Poor, 40 Shillings only, if in Behalf of the Informer himself. Secondly, that it is indeed said that the Defendant undertook to sell these Liquors without Licence, but not that he did sell them without it. Thirdly, That it is indeed said that he did sell them, but not that he had no Licence for that Purpose. Fourthly, that it is said he sold by Retail, without saying by what Measure; for this Purpose was cited the Case of Astall qui tam and Andrews, Mich. 13 Geo. 1. and it was observed, that since the Statute of 2 Geo. 2. this was more especially requisite; because by that Act any Person may sell under a Gallon, without Licence. Fifthly, that it is said the Defendant sold these Liquors to be drank in his House, and not said that they were drank there. Upon one of the same Acts, a Conviction was made for keeping a Greyhound, without saying that the Greyhound was made use of in destroying the Game. That Conviction was removed up by Certiorari and quashed; yet the Words of the Act there only are, shall keep or use. Sixthly, that it is said the Defendant was summoned, without mentioning by whom; and in real Actions Experience shews, that this is necessary. Seventhly, that it is not said that Oath was made, that the Party was summoned. Eighthly, that it does not appear when or where the Conviction was made. The Information was given, and Evidence examined upon it in one Day, and then the Matter was put off. Lastly, that it is not said to whom the Forfeiture is to be paid. As to the sixth and seventh Exceptions, the Court said that the present Conviction is in the same Manner that all others are. To the fifth, Judge Page said that he remembered the Case cited, and that it was determined so in Lord Holt's Time. But Judge Probyn inclined to be of Opinion, if a Man was to keep Nets in his House, that that might be sufficient to convict him. Upon the whole, the Court made a Rule for quashing the present Conviction, unless Cause. *Vide postea.*

When a Conviction is made for selling distilled Liquors without a Licence, what shall not be said to be a good Conviction of that Sort.

The King *and* The Trustees of the Kingston Turnpike.Vide ante
218.

THIS Matter coming on again, M^r. Fazakerly and M^r. Strange took several Exceptions to this Order made by the Justices. They said they conceived that the Notice in this Case was given too early. The Justices had no Jurisdiction over this Cause, nor was there any Matter before them, till the Complaint that was made the 6th of July last. The Notice therefore was not to be regarded, being given before that Time. They said that no Oath appeared neither to have been made of this Notice, and that was another Exception to it. In all these Proceedings they apprehended likewise, that Notice of itself is not sufficient; but there ought to be an actual Summons served upon the Party to attend, which was intirely omitted in this Case. Another Objection to this Proceeding was, that the Order was made by the Court of Sessions on the same Day in which the Complaint was made before them. They did agree, if the Defendants had appeared and answered to the Complaint at the Time it was made, and the Sessions had been of Opinion, that their Answer was insufficient, that they might have made their Order immediately. But when the Defendants did not waive that Advantage by answering, they conceived it was too precipitate a Proceeding to pass Judgment against the Defendants immediately. And lastly, they submitted it, that the subject Matter of the Complaint was not within the Jurisdiction of the Justices. The Complaint is of a Turnpike erected in the Town of Kingston; unless this Turnpike was erected in the Road leading from London to East-Greenstead, it might as well have been erected in Northumberland. They said they should not contend but Kingston was in the Road leading from London to East-Greenstead; but this Turnpike might have been erected in any Part of the Town of Kingston, that does not lie within this Road. So that they apprehended that the Complaint ought to have been made of a Turnpike erected in some Part of this Road; and for these Reasons they submitted it, the Order should be quashed. Serjeant Wright argued on the other Side. To the Objection concerning the Notice, he said he apprehended the Notice was well given. A Notice of an intended Appeal, a Notice of an intended Motion, are frequent in Experience; and by equal Reason a Notice of an intended Complaint is good. To the two next Objections, for want of an Oath appearing of the Notice, and likewise for want of a Summons appearing; he did agree that if this had been a Conviction, the Objections would have been fatal. But he conceived that the present Act of Parliament was a remedial Law, a Law made to prevent the Abuses of these Turnpikes upon the publick Road, by which Law the Justices have only a Power given them to remove the Abuse, and not to punish the Party doing it. So that the present Act done by the Justices cannot be considered as a Conviction, but merely as an Order. In the Case of The Queen and Colins, Trin. 3 Ann. an Exception was taken to an Order of Bastardy, for there being no Sum-

Summons appearing upon the Order. The Court there over-ruled that Exception; and their Reason for doing so he said, according to his Notes, was, that the Statute of 18 Eliz. which the Order was made upon, was a remedial Law, and not a penal one. He observed that in that Case the Court declared, that they would intend the Party was summoned; and therefore an Oath and Summons shall be intended to have been made in the present one. To the Objection for the Order's being made upon the same Day in which the Complaint was; he said it was well known, that Justices in Eyre had that Power, and that Justices of Oyer and Terminer and Gaol-Delivery have to this Day; for which Reason he did not see but the present Justices might have done the same, even admitting that the Defendants had appeared and prayed a Day. But when the Defendants upon due Notice given them, did not appear, he conceived they were well justified in making their Order at that Time. To the last Objection he said, he apprehended that the Word Turnpike necessarily imports a Gate, which is erected to take Toll at; and if the Trustees had erected such Gate in any one Part of the County, the Justices of the Sessions have a Power to remove it. He did agree that upon the first of these Acts of Parliament, the Words were confined in such a Manner, as that the Justices had not this Power; but where the Turnpike was erected in the Road itself. The present Act was made to prevent that Inconvenience, and by that Statute the Justices have a Power to remove it in whatever Part of the County it is erected. Mr. Fazakerly and Mr. Strange argued by way of Reply; they said that they conceived this Adjudication made by the Justices, must be considered in the Nature of a Conviction. The Adjudication made by them is, that the Turnpike shall be abated; the Turnpike was as much the Property of the Trustees, as their own House; the Justices therefore have by a final Adjudication, from which there is no Appeal, taken away from the Trustees Part of their Property; and if this was not a Conviction, they did not know what was. If this was to be considered as a Conviction, they observed that the Counsel of the other Side have admitted that the Adjudication must be bad for the Want of a Summons appearing. But even admitting that this was not to be considered as a Conviction, but only as an Order, yet still they apprehended this must be bad; because the Justices have given this special Reason for making their Order, that the Defendants did not appear upon the Notice given, which shews evidently, that there was no Summons; and wherever that is the Case, that the Justices discover themselves that there was no Summons, it is impossible that the Court can intend that there was one. They observed there has been a Doubt made, and that a very great one, whether the Serving a Summons upon the Party was sufficient, unless he actually appeared upon it; for this Purpose they cited the Case of The King and Simpson, which was a Conviction for Deer-stealing. The Justices set forth upon that Conviction, that the Defendant would not appear before them; upon that they appointed a Time and Place in the Summons for his appearing. Several Times was it argued, whether that was sufficient; at last

indeed the Court was of Opinion that it was; but it never was imagined, but the Serving the Party with a Summons was necessary, which they submitted did not appear to have been done in the present Case. Mr. Strange then in particular took Notice of the Want of the Proceedings of the Justices, by their determining this Matter the same Day on which the Complaint was. He said he was of Counsel with the Prosecutor in the Case of The King and Hales, which was an Indictment of Forgery, and tried at the Old Bailey. The Defendant there had taken a Copy of his Indictment, he was actually in Custody, and the Prosecutor insisted for a Trial the same Sessions in which the Bill was found. The Defendant desired that his Trial might be put off till the next Sessions, and the Court granted it. In the present Case, Mr. Strange said he apprehended, unless the Court would relieve upon this Application, the Party was intirely without Remedy. The Court he said hardly ever grants an Information against the Justices for what they do at a Sessions; and the Defendants have offered, and do now, to try this Matter with the Prosecutor in a feigned Issue; but it has been refused. The Court declared their Opinion in the present Case, that the Statute, which the present Proceeding was founded upon, was a remedial Law, and not a penal one; for which Reason they said the present Adjudication was to be considered as an Order only, and not as a Conviction. They agreed likewise, that as the Defendants did not appear at the Day which was given them, to desire that the Time might be enlarged for their Defence, the Justices were well warranted in making their Order the Time they did. And farther they agreed, that upon this second Act of Parliament, the Sessions had a full Authority to inquire into this Turnpike, in whatever Part of the County it was erected. In some other Points they a little varied in their Opinions. Judge Page and Judge Probyn thought that where a Prisoner is in Custody, the Justices of Oyer and Terminer and Gaol-Delivery have an Authority to insist upon the Prisoner's making his Defence on the same Day in which he is indicted, let his Offence be of whatever Nature it will. Judge Lee was of a contrary Opinion, where the Offence is only a Misdemeanor. Judge Page was of Opinion that a Summons in this Case ought to have issued forth, notwithstanding the Notice; but that it should be intended such Summons did issue. Judge Probyn and Judge Lee were of Opinion in this Case, that as the Act had directed that nothing should be in this Road, but by the Direction of the Trustees, the Direction which the Trustees gave, should be considered as an Order. That the Authority of the Justices in their Sessions, was not to be considered as an original Jurisdiction, but as a Jurisdiction upon an Appeal. That therefore the Notice itself was sufficient, and a Summons need not be intended. However in whichever Light this Matter was considered, the whole Court agreed that the Order ought to stand, accordingly discharged the former Rule.

Dale and Mottram.

IN Debt on Bond with Condition for performing an Award, the Defendant pleaded no Award; the Plaintiff replied, that a Reference was made to these Arbitrators of certain Matters relating to a Partnership between the Plaintiff and Defendant, and the Arbitrators awarded, that the Defendant should pay into the Hands of one John Oakes, who was Agent for the Partners, such a Sum of Money in Trust for the Plaintiff and Defendant, and for the Benefit of the Partnership, which he had not done; and to this Replication there was a Demurrer. Mr. Strange argued in Support of the Demurrer, and said, that he apprehended that this Part of the Award, which the Breach was assigned upon, was void, because it requires the Defendant to pay a Sum of Money to a Stranger. In the Case of Lane and Tanner, Trin. 12 Anne, an Award was, that the Defendant should deliver up to the Plaintiff's Possession a House that at the Time of the Award was in the Possession of Sir Thomas Wiseman; and this Award was held to be void. To the like Purpose he cited Roll's Abr. 243. Pla. 6 and 247 Pla. 4. 3 Cro. 4. and Godb. 12. Mr. Fazakerly argued on the other Side, and said, that he should not contend but in the general that the Rule laid down by the other Side was right. But where a Dispute is concerning Partners in Trade, as here it was whether the Defendant had put in his whole Share into the Stock, he did not know how the Arbitrators could do a more proper Thing, than to Award, that the Defendant should pay in the Deficiency to the Agent of the Partnership in Trust for the Plaintiff and Defendant and for the Benefit of the Partnership. He put the Case to be, that the Arbitrators had awarded, that the Defendant should pay a Sum of Money for the Benefit of the Plaintiff to such Person, as the Plaintiff should appoint to receive it; he believed, he said, that it would hardly be contended, but such Award would have been good. The Court was of the same Opinion; accordingly gave Judgment for the Plaintiff, unless Cause before the End of the Term.

What shall be said to be a good Award, notwithstanding it directs that a Sum of Money shall be paid to a Stranger.

Oates and Collins.

IN an Action upon a Promissory Note of 20 l. for Value received, the Defendant pleaded Non Assumpsit, and proved upon the Evidence, that the Note was given for Money won upon a Wager at a Horse-Race; this Cause was tried at the Sittings before the late Lord Raymond, and a Case made upon this Matter for the Opinion of the Court. Mr. Fazakerly argued for the Defendant. In the 16th of Car. 2. 7. there was an Act made, which was intituled An Act against deceitful, disorderly and excessive Gaming. He did agree, that the present Note was not included within that Act; but Horse-Racing is one of the Games expressly mentioned in it. In the 9th of Anne 14. another Act was

When Money is won upon a Wager at a Horse-Race, how far such Money shall not be allowed to be recovered.

was made, intituled An Act for the better preventing of excessive and deceitful Gaming. That Statute takes Notice, that the Laws then in Force were not sufficient to prevent the Mischiefs, which happen by Gaming; and for that Reason provides, that all Securities shall be void, which are given for Money won by Gaming or Playing at Cards, Dice, Tables, Tennis, Bowls or other Game or Games whatsoever. This Statute, he said, has a plain Relation to the former Statute, and every Game mentioned in the former Statute, he submitted it, was plainly within the Meaning of this. Mr. Spelman argued on the other Side, and submitted it, that these were Penal Laws, and therefore to be construed strictly. Horse-Racing, he observed, was an Exercise of Diversion only, and not Gaming, it could not therefore by any Means come within the Description of the Statute of 9 Anne, that has been mentioned. And to shew how other Statutes, which contain general Words in them, have been construed he cited 2 Inst. 478. 2 Rep. 46. 2 Lev. 142. and 3 Lev. 273. Salk. 609 and 625. Judge Page declared his Opinion to be, that the present Case was not within the Statute of Ann. Gaming he took to be a Reiteration of some Chance or Hazard at one and the same Sitting. But Horse-Racing was an Exercise of Recreation, and therefore could not fall within the Notions of Gaming. That all Wagers were not within this Act of Parliament, he said was plain, from the constant Allowance of Policies of Assurance. And he took it, that a Wager about the Running of a Brace of Greyhounds could not neither. Judge Probyn and Judge Lee were of a contrary Opinion. They said, they took it that the Statute of 9 Ann. was only made by Way of farther Inforcement of the Statute of 16 Car. 2. and therefore that all the Games, which are recited in the first Statute, must be intended to be included in the second. In Ven. 253. Judge Lee said it is held, that these Statutes are to be construed liberally. However as the Court did not agree in Opinion upon this Point, the Matter was ordered to stand over to be spoke to again.

Denail and Brickland.

When a Judgment is omitted to be entered up within the Time that by the Rules of the Court it ought to be, how far the Court will not discharge the Defendant out of Execution upon that Account.

MR. Fazakerly moved, that the Defendant might be discharged out of Custody, by Reason that it was seven Years since the Judgment was signed, the Defendant lately taken in Execution upon it; yet to this Day the Record was never made up and entered upon the Roll. Judge Page said that he took it, that the Plaintiff's Attorney has two Terms given him to do it in after signing the Judgment. But Judge Probyn and Judge Lee declared, that they took the Rule of the Court to be, that the Plaintiff's Attorney must do it before the End of the next Term after signing the Judgment; and the Master confirmed their Opinion. However the Court agreed, that they could not discharge the Defendant out of Custody on such an Omission. They said they could only order the Plaintiff's Attorney to bring in the Record, that the Roll might be made up; which they accordingly did in the present Case.

The King *and* Rainer.

THE Defendant having been convicted for printing a scandalous Libel upon the House of Lords and Commons, called Robin's Game, or Seven's the Main; the Court now set a Fine of 50 Pounds upon him, committed him for two Years, and until he should pay this Fine, and likewise till he should find Security for his good Behaviour for seven Years. Vide ante 232.

The King *and* Dr. Earbury.

THE Defendant had given Notice to the Attorney General, that he should move the Court, that his Recognizance should be taken off the File and discharged, for certain Errors appearing upon the Face of it. He said he had been taken up by a Warrant from one of the Secretaries of State, signed De la Faye; and he conceived that this Warrant ought to have been signed with the Name of the Secretary of State himself, and not with the Name of one who was but an Officer under him. When he was brought before the Secretary of State upon this Warrant, the Secretary of State committed him; and since a private Justice of Peace has taken upon himself to bail him, requiring him to enter into this Recognizance. No Man, he submitted it, has Authority to bail another, unless he is equal to the Person committing. A Justice of Peace is an Officer inferior to a Secretary of State; and therefore he conceived that this Recognizance must be illegal. He observed farther, that the Terms of this Recognizance are, that he shall keep the Peace; and likewise that he shall appear in the Court of King's Bench, to answer such Matters as shall be objected against him. He did agree that a Justice of Peace has Authority to bind over to the Sessions; but this was the first Time that he ever heard that they had Authority to bind over to this Court. And to shew that they could not have such an Authority, he appealed to the Statute of 18 Edw. 3. 37 Edw. 3. 18. 49 Edw. 3. and 1 & 2 Phil. & Ma. He took Notice farther, that he had entered into this Recognizance so long ago as Mich. Term last; and no Information has been filed against him, nor has he had one single Charge during all this Time. The Court said that they believed it was usual for the Secretaries of State not to sign these Warrants themselves. To the second Objection they could not inquire into it upon this Motion; because the Notice is, that the Court will be moved to discharge the Recognizance, for Errors appearing upon the Face of it. To the third they said, these Recognizances are very frequent in this Court; and therefore they should certainly not order the present one to be taken off the File upon Motion. If the Recognizance is illegal, the Defendant has his Remedy another Way. To the last Objection, they did agree that if there had been a Year passed from the Time that this Recognizance was given, and no Prosecution against the Defendant, he would have been intitled to

be discharged. But till then, by the Rules of the Court, he cannot; accordingly the Motion was refused. *Vide postea.* 346.

Elliot and Crisp.

When a Motion is made to put off a Trial, what shall be said to be a proper Affidavit upon such Occasion.

ON a Rule to shew Cause, why a Trial should not be put off for the Absence of a Witness, an Objection was taken to the Affidavit which the Rule was made upon, that it was only sworn that the Witness would not be back till August, but not when he would be back certainly; accordingly the Rule was discharged. The next Day Mr. Kettleby moved this Matter again, and said that he had now an Affidavit that it was verily believed the Witness would be back in September; accordingly the Court held this Affidavit to be sufficient, and made a Rule for shewing Cause, why the Trial should not be put off, on Payment of Costs. They said that these Rules are always drawn up on Payment of Costs, whether there be any Costs that the other Side are at, or not. *Vide postea.*

Homes against Mendes Cafars.

Vide ante
284.

MR. Fazakerly came now to shew Cause, and said he did agree the Case of Innys and Sinclair was as has been mentioned. But he submitted it, that it was distinguishable from the present one; because in the present one, the Action is brought by Assignees of a Commission of Bankruptcy, who can have no farther Knowledge of the Debts owing to the Bankrupt, than as appears to them by his Books. He observed it might be said that the Plaintiffs might get some Person to swear to this Debt positively; in Answer to this he said, he conceived that this could not be required of them; because till the Time of Trial no Process lies for that Purpose. However the Court made the Rule absolute; and said upon this Act of Parliament they thought there was no Difference between the Cases.

Clark and Paget.

When a Defendant is served with a Copy of a Writ, in Pursuance of the Statute of 5 Geo. 2. 27. what shall not be said to be a sufficient English Notice, within the Meaning of that Act of Parliament.

ON Rule to shew Cause why Proceedings should not be staid upon the Statute of 5 Geo. 2. 27. by Reason of there being no Name of the Defendant inserted in the English Notice; Mr. Strange submitted it, that it was not necessary; because the Defendant himself was personally served with it. However, the Court was of Opinion, that as the Form inserted in the Act, begins with the Words You A. B. the Letters A. B. must stand for the Name of the Defendant; and therefore the Name of the Defendant ought to have been inserted; for which Reason they made the Rule absolute.

Anonymus.

MR. Wheat moved for an Information against one Hurst, for acting as Under-Sheriff of Huntingtonshire, and as an Attorney at one and the same Time. He said this was against the Statute of 1 H. 5. 4. Accordingly the Court made a Rule to shew Cause. Vide postea.

When a Person acts as Under-Sheriff and Attorney both, contrary to the Statute of

1 H. 5. 4. how far the Court will grant an Information against him.

The City of London and Sir Fisher Tensh.

THE Common Serjeant moved to make a Rule absolute for amending a Declaration. Mr. Bootle junior said he should not oppose it upon Payment of Costs, and four Days Time to plead, as the Plaintiff had given no Rules to plead this Term, though the Declaration was of last Term. The Master informed the Court, that if Rules to plead had been given this Term, the Defendant would have been intitled only to two Days Time to plead in; but as the Rules were not of this Term, he thought him well intitled to four Days; accordingly the Rule was made absolute on those Terms.

What are the Terms which the Plaintiff must submit to, when he moves to amend his Declaration.

Bell qui tam and Wyat.

IN an Information qui tam upon a usurious Contract, Mr. Harvey moved that the Prosecutor might have Liberty to compound the Forfeiture. He observed that in the Exchequer, such Motions are frequent; and Judge Page said he remembered that the same has been allowed here; accordingly the Court made a Rule to shew Cause.

How far the Court will give Leave that a Prosecutor shall compound his Prosecution.

Westpee and —

IN an Action brought by the Plaintiff, as Assignee of a Bail Bond, the Bail pleaded Comperuit ad diem; the Plaintiff joined Issue upon that Fact. Now Mr. Dennison said, that the Truth of the Case was, that the Defendant did give Bail at a Judges Chamber; but Exceptions were taken to that Bail in Time, and they never justified. A Bail-Piece he said therefoze there was signed by the Judge, which has a Colour of an Appearance, though not a real one; for which Reason he moved, that the Bail-Piece might be taken off the File. Judge Probyn said, if this was the Fact, the Bail-Piece would do the Plaintiff no Prejudice; for there are only the initial Letters of the Names of the Bail, when the Judge signs it. The Names are afterwards drawn out at length, if there are either no Exceptions to these Bail within Time, or if there are Exceptions to them, and they justify to the Satisfaction of the Court. In the

How far a Court will not give Liberty that a Bail Piece shall be taken off the File, by Reason that it cannot amount to an Appearance.

the present Case it is said that the Exceptions to the Bail were put in in Time, and they did not justify; the Blanks of their Names therefore could never be filled up; and consequently this can no way be called an Appearance; for which Reason the Motion was refused.

The King *and* Amys.

Vide ante
244.

MR. Fortescue now came to shew Cause why this Order should not be quashed. He said there had been four Exceptions taken to it. First, that the Trade of a Carpenter is not within the Act. Secondly, that it does not appear that the Master had any Money with the Apprentice. Thirdly, that the Sessions cannot order Restitution of such Money. And lastly, that it does not appear that the Master appeared, or was summoned and made Default. He began with this Answer to the last Exception first. And as to that he submitted it, that this did sufficiently appear. The Order recites the Complaint of the Defendant's not instructing his Apprentice well, which appearing to be true (says the Order) and after hearing Counsel and Evidence touching this Matter, it is ordered by this Court, &c. Now Counsel and Evidence could not properly be said to be heard, but by hearing Counsel and Evidence on both Sides. He said further, that he apprehended it was not necessary that the Defendant should have been summoned at all. The Defendant by being bound over to the Sessions by the head Officer, whom the Complaint was first of all made to, was bound to take Notice of the Time, when he was to appear there; at least he conceived that such Summons need not be set forth in the Order; at most it is Matter of Proceeding only; and therefore if requisite, shall be intended; and for Authority in Answer to this Exception he cited Salk. 67. and 490. By which Cases the third Exception was answered likewise; for there it fully appears that the Sessions may order Restitution. In Answer then to the second Objection he submitted it, that it could not otherwise be intended by the Order, but that the Defendant did receive Money with his Apprentice; for the Words are, That *William Amys* do return and pay back the Sum of 5 Pounds to his Apprentice. Now he supposed that it would hardly be contended, that a Person could pay back Money which he had never received. Then as to the last Exception, he did agree that the Trade of a Carpenter is not mentioned within the 3d or 27th Section of the Statute which this Order is founded upon, but within the 30th it is; and the 35th must certainly have a Relation to all the Trades that are expressly mentioned before; and he believed it would be very difficult to assign a Reason why it should not extend to all Trades in Being at that Time; especially since it is admitted that the Clause of the Statute, which relates to a Service of seven Years Apprenticeship, does extend to all. Mr. Strange argued by way of Reply, and said that he apprehended it did by no Means appear that the Defendant was summoned in the present Case. Hearing Counsel and Evidence upon a Complaint, may naturally be under-

understood of hearing Counsel and Evidence on the Side of it; and if the Truth of the Fact had been otherwise, undoubtedly it would have been set forth in the Order in the common Form, viz. after hearing Counsel and Evidence on both Sides. Then in order to shew that a Summons was necessary, he said he did agree if the Application had been to the head Officer, before the Complaint came before the Sessions, there would have been no Occasion for a Summons; but it is well known that the settled Determination of the 35th Session in this Act of Parliament has been, that the Sessions have an original Jurisdiction, and that that Part of the Clause which speaks of the previous Application to the head Officer has been construed to be only directory. The present Order therefore must be intended to have been made upon an original Complaint to the Sessions, in as much as the contrary does not appear; and in such Case, he conceived a Summons must be absolutely necessary. Then in Order to shew that the Summons ought to appear, he said he thought that the Cases cited out of Salkeld by the other Side did in a Manner allow it. In Maintenance of the third Exception, he said he did agree if the Apprentice in the present Case had been bound out with Money raised by the Justices, they might have ordered Restitution; but as this does not appear, it must be taken to be otherwise; and therefore he apprehended this Exception would prevail. To the second he submitted it, that the Adjudication of inferior Jurisdictions is not to be taken by Intendment. And to the first he did own, that he was not apprised of this Answer; and therefore this Exception he was willing to give up. The Court declared their Opinions, that the giving up the first Exception was very right; because undoubtedly the Answer that has been given is full in this Point. They said likewise, that they were of Opinion that the second and third Exceptions were answered likewise; but as to the last, concerning the Summons, the Court were not so well agreed in; for Judge Probyn had doubts whether the Summons ought not to have been set forth. And upon this the Matter was ordered to stand over.

N. B. Mr. Strange in his Argument of this Case said that in the Case of The King and Walkely, Mich. 12 George 1. the Case of The King and Garely was cited, and upon the Authority of that Case the Order was quashed, which was made in the Case of The King and Wakely. It was the Trade of a Cutler, which the Apprentice there was bound to; an Order of Discharge made by the Justices; and the Court held there, that that was not a Trade within this Part of the Statute.

Bishop and Stacey.

How far Law
Proceedings
shall be said
to be pro-
perly put
into English,
or not,
within the
Meaning of
the Statute
of 5. Geo. 2.

IN Debt upon a Recognizance there was a special Demur-
rer to the Declaration, and two Matters shewn for Cause;
first, that in this Declaration, which is in English, the Plaintiff
is said, to bring his Bill against the Defendant being in Cu-
stody of the Marshal of the King's Bench, whereas the Form
of the Latin Declaration used to be in Custod' Mar' Marefc'
in Cur' Domini Regis coram ipso Rege; secondly, that it is said he
brings his Bill generally, without saying in proper Person, or
by Attorney, Guardian or Prochein Amy. And Mr. Cay now
argued in Support of these Exceptions. To the second he said,
the Authority of 1 Roll's Abr. 794. is express, that in the Case of
a Defendant it must be set out, whether he appears in Person
or by Attorney, by Guardian or Prochein Amy; and he sub-
mitted it, there was equal Reason it should be so in the Case
of a Plaintiff. To the first he did agree, that in common
Speech the Marshal is called the Marshal of the King's Bench;
but in pleading the Strikeness of the Stile of his Office must
be set out. Mr. Dennison argued on the other Side. He said,
he did agree, that where it is set out, that the Plaintiff brings
his Bill per Attornatum suum, or per Cuting Attornatum suum, that
is bad; because the Plaintiff admits, that he brings his Bill
by Attorney, and has set out that imperfectly. But in the pre-
sent Case he apprehended, that it should be intended he brought
it in proper Person; and therefore submitted it, that that Ex-
ception was answered. To the other he relied upon Salk. 439
and 602. and submitted it, that the Stile of the Office of the
Marshal is as legally described by the Name of the Marshal of
the King's Bench, as by that of the Marshal of the Marshalsea;
and by the Authority of those two Cases, which he cited, if the
Stile of his Office had been set out by the Name of the Mar-
shal of the Marshalsea, that would have been good. He ob-
served farther, that throughout the Statute of 8 & 9 W. 26.
this Officer is called Marshal of the King's Bench Prison;
and therefore submitted it, that that was at least as proper a
Description of his Office, as the other. However the Court
said, that for the Causes assigned they were at present inclined
to think that the Declaration could not be maintained; but
ordered the Matter to stand over.

Martin and Duffield.

Vide ante

THE Errors to reverse this Outlawry coming now on in
the Paper to be argued, Mr. Strange said, that he did not
think it necessary to mention above one of them, which was,
that the Hustings are said to be held in Civitat London, and not
pro Civitat. Upon Outlawries in the County Courts, he said,
this is an Exception constantly allowed. Accordingly the Court
was of the same Opinion, but at present would not reverse
it; because the Defendant had not given sufficient Notice of his

Bail

Bail to the Original Action; the Notice being given but last Night, whereas the Court said there ought to have been one whole Day from the Time of giving Notice; and therefore ordered this Matter to stand over till to Morrow, that the other Side might have an Opportunity of inquiring into the Circumstances of the Bail. The next Day the Defendant's Bail justified themselves; and upon that the Outlawry was reversed.

The King *and* Rosamund Robinson.

A Rescous having been returned against the Defendant, *Mr.* Strange said he was willing to confess the Rescous, but moved, that he might be discharged upon paying a small Fine. He did agree, that upon the Affidavit of two Bailiffs an Attachment was granted against her, and that he now lay in York Gaol in Custody under that Attachment. But he said he had Affidavits of sixteen People to shew, that this Complaint against her was absolutely False, and without the least Colour of Foundation. The Clerk in Court, he observed, would undertake to pay the Fine; and therefore upon these Circumstances, and her Payment of the Fine which the Court should set, he hoped she should have a Superfedeas. *Mr.* Fazakerly said he should not oppose it, if she should go before the Master. The Court however ordered the Affidavits to be read, and on hearing them read, they set but 6 d. Fine upon her, without requiring her to go before the Master, and likewise granted a Superfedeas.

When a Rescous is returned upon a Person, how far the Court will allow him to submit to a small Fine without requiring him to talk with the Prosecutor.

The King *and* Halpyn.

THE Defendant having been ordered to be examined upon Interrogatories, Serjeant Belfield moved, that he might go before the Master to pay the Prosecutor such Costs and Damages, as the Master should appoint, and on Payment thereof that he might submit to a small Fine. *Mr.* Kettleby on the other Side said, that he should not oppose it, provided the Defendant would instantly make a Deposit before the Master of such Sum, as he should think reasonable. Serjeant Belfield consented to that likewise. Accordingly a Rule was drawn up by Consent for that Purpose. But Judge Page said, if the Prosecutor had not consented, the Court could have made no Rule in it.

How far the Courts of Law do not require a Person to make a Deposit.

Anonymus.

How far the Court will not quash an Excommunicato Capiendo, notwithstanding some uncertainty in describing the Offence.

MR. Keebleby moved to quash a Writ of Excommunicato capiendo for Uncertainty; the Sentence against the Defendant being set out to be in a Cause of Slander or Defamation. He said he remembered M^r. Strange obtained a Rule for quashing such Writ in causa Convitii sive defamationis. The direct Translation of the Word Convitium he took to be Slander; and therefore submitted it, that that Case was directly in Point with the present one. Judge Lee said he remembered, when M^r. Strange made that Motion, he cited a Book which shewed, that the Word Convitium in the Civil Law Sense of it signified a different Matter from the Word Defamatio; therefore in that Case there was a plain Uncertainty. But in the present one the Court said that their Opinion was, that a Charge of Slander and a Charge of Defamation signified exactly the same Thing; for which Reason the present Motion was refused.

Tonson and Ironson.

How far the Court will grant an Attachment against a Witness, by Reason of his not attending at the Trial, in Pursuance of a Subpœna.

MR. Banks came to shew Cause why an Attachment should not go against one Bryan Ironson, who was an Attorney, for not attending at a Trial in Pursuance of a Subpœna, whereby the Plaintiff was forced to be nonsuited. But before he went into his Defence, M^r. Marsh on the other Side desired Leave, that a Supplemental Affidavit might be read, by which it was sworn, that this Attorney took the Subpœna into his Hand, and read it or seemed to read it; which the Court accordingly allowed of. The Defence then, which M^r. Banks made for this Attorney was in this Manner. He said he had no Opportunity to answer the Supplemental Affidavit now produced; and by the Affidavit, which the Rule was obtained upon, it was only sworn, that he was served with a Ticket annexed to this Subpœna; now in the Ticket he was only required to appear at Westminster before Sir Francis Page at the Court-house there; the Court-house, he said, was the Place near the Court of Requests, where Writs of Inquiry are executed, and there he did attend according to the Time mentioned in the Ticket. It was insisted on the other Side by Way of Reply, that the Subpœna was right, as it ought to be; the Ticket now since the English Act cannot be material; and therefore this Attorney shall not take Advantage of any Defect in that. The Court were of Opinion, that the Facts contained in the Supplemental Affidavit were Facts of a different Nature from those sworn in the First; which this Attorney had not an Opportunity of answering. They thought that those Facts made the Case pretty clear against him, though perhaps upon the first it might be doubtful; accordingly discharged the Rule for shewing Cause; and gave the Plaintiff Liberty to move for an Attachment upon this Supplemental Affidavit, with the Subpœna annexed to it; which

which accordingly was done; and a Rule made to shew Cause upon it.

The King and Sandys.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not go against the Defendant for exercising the Office of Recorder in the Borough of Egham, Mr. Wills said, that the Fact was in the Manner following. By the Constitution of this Borough the Mayor, Aldermen, Recorder, Chamberlain and Capital Burgesses make the Common Council. Upon the Election of a Recorder it is provided by the Charter, that the Chamberlain shall not be present, but that he shall be chose by the Mayor, Aldermen and Capital Burgesses, or the major Part of them. Upon the Election of a Chamberlain it is provided, that the Recorder shall not be present, but that he shall be chosen by the Mayor, Aldermen and Capital Burgesses, or the major Part of them. Notice of an Assembly of the Common Council was ordered by the Mayor to be given for the 29th of September last, which was done accordingly. Eleven of the Body met at that Day, in which Assembly was one Mr. Bolen, who had been Alderman and Chamberlain both for several Years together. When they were met Mr. Barker, the late Recorder, surrendered his Office, and the present Defendant was elected by the Majority in his Room. An Entry was made of that Election to this Effect, At a Common Council held such a Day — Sandys was elected Recorder by the said Common Council. And at a like Assembly held the second of October following, in Pursuance of the like Notice he was elected into this Office again by the same Majority, and was then sworn into his Office. Mr. Wills said that the Objection made to the Defendant's Election was, that the Common Council consists of the Mayor, Aldermen, Recorder, Chamberlain and Capital Burgesses; that Notice was given to them of an Assembly of the Common Council; that when they were assembled, they could do no Act, but an Act of Common Council; that the Recorder is not to be chosen by any Assembly, which the Chamberlain is a Member of; consequently, it is objected, that he is not to be chosen by the Common Council; and therefore that the Defendant's Election was illegal. Mr. Strange agreed, that the Fact was truly stated, and likewise the Objection; but desired to mention only one Case in Support of it, which was the Case of The King and Carlisle, where it was determined, that when Notice is given of an Assembly of a Common Council, and the Common Council meet accordingly, Part of that Assembly cannot go away, and another Assembly consisting of a less Number, though of the same Persons, form themselves, and transact Business at that less Assembly. Notice was given of the greater Assembly, and not of the less; and therefore what is done at the less Assembly is without Authority. Mr. Parker on the same Side said that he had a Note of that Case, and he had taken it in the Manner following. It came on upon a Return to a Mandamus

How far the Court will grant an Information in the Nature of a Quo Warranto against a Person for executing an Office, by Reason that the Persons who chose him had not Authority to do so.

and was argued first of all in Trin. 5 Geo. 1. It was a Mandamus to restore one Polter to the Office of Capital Citizen of the City of Carlisle. The Return to it was, that the Mayor, Aldermen, Bailiffs and Capital Citizens form the Common Council of that City; that the Power of removing a Capital Citizen is in the Mayor and Aldermen, or the major Part of them. The Return farther set forth, that on such a Day Notice was given of an Assembly of a Common Council, who assembled themselves accordingly; that Polter was summoned at that Assembly, to answer such Crimes as should be objected against him, for which he was to shew Cause, why he should not be removed from his Office; that Polter did not appear; whereupon the Mayor and Aldermen, *sic ut præfertur assemblat*, made an Order for removing him. In Trin. 6 Geo. 1. Lord Chief Justice Pratt delivered the Resolution of the Court, that the Return to the Mandamus was bad. He said, they were of Opinion, that the Mayor and Aldermen ought to have been summoned in a distinct Capacity; and thereupon a peremptory Mandamus was awarded. Mr. Wills then went on in his Argument, and endeavoured to answer the Objection. He said he was of Counsel in that Case of Carlisle, and should not contend but the Fact might be as it was stated; but, if he remembered right, he took it a good deal of the Stress of the Argument, which the Chief Justice delivered, went upon this, that it appeared by the Words *sic ut præfertur assemblat*, that the Mayor and Aldermen acted in their Capacity as Members of the Common Council; as Members of the Common Council they had no Power to make this Removal; they had this Power in an intire distinct Capacity, as making together one distinct Body of Mayor and Aldermen; and as it appeared they did not act in that Capacity, the Removal was undoubtedly bad. He said he conceived, that that Case by no Means came up to the present one. For in the present one, he submitted it, that the Common Council have the Power of electing both a Recorder and a Chamberlain; the Charter only provides, that at an Election of a Recorder the Chamberlain shall not be present. Mr. Bolen, as Chamberlain, was not present, nor does it in the least appear, that he acted as such. For which Reason he hoped, that the Rule should be discharged. The Court said this was by no Means so clear a Point in Favour of the Defendant, as to have it determined upon a Motion. Accordingly they made the Rule absolute.

*J. L. 2. Jan. 240. Sep. 239.
Mr. Dr. P. 133. Sep. 239.
Report 310, 230, 406.*

The King and Lloyd.

How far a Clerk of the Peace shall be said to be duly removed from his Office, or not.

THIS was a Conviction at the Sessions against the Defendant, late Clerk of the Peace in the County of Cardigan, whereby the Justices there removed him from his Office upon a Complaint that was made before them. Mr. Fazakerly said it was founded upon the Statute of 1 W. & M. 21. and he was ready to take several Exceptions to it. One though, he believed, would be sufficient at present; which was, that the Justices have not set forth the Evidence upon which they

con-

convicted him. In the Case of The Queen and Guery, Pasch. 13 Ann. a Conviction was quashed upon this Exception; and so was another Conviction quashed upon the like Exception that same Term. He said he would give the Gentlemen of the other Side a Note of some more Exceptions, which he should take to it; accordingly this Matter stood over. Vide postea. 310.

Weele and Smith.

MR. Fazakerly moved to make this Rule absolute upon an Affidavit of Service; and upon that Serjeant Eyres said he was ready to shew Cause. The Objections to this Execution he observed were two; First, that the Name of the Plaintiff was mistaken in the Fieri Facias. Secondly, that the Execution was taken out pending a Writ of Error; he said he would speak to the last Objection first. The Counsel of the other Side said that they principally relied upon the other Objection; and they hoped that was so plainly with them, that it would be unnecessary to go into the other; which accordingly the Serjeant did. He said he did agree, that in the Fieri Facias which the Sheriff made the Execution upon, there was a Mistake in the Plaintiff's Name. But he observed it was the smallest Mistake that possibly could be, it was the Mistake of the first Letter only in the Plaintiff's Name, an N instead of a W. This Mistake indeed was not discovered till the Writ was executed; but before the Day of the Return of it it was discovered, and a new writ actually sued out and delivered to the Sheriff before that Time, with the right Name of the Plaintiff in it. He said as this was a mere Mistake, he submitted it, by suing out the new Fieri Facias within that Time, and delivering it to the Sheriff within that Time likewise, it was cured in Point of Law; at least he hoped the Court would not interfere in this summary Method, but leave the Party to his Remedy, if he has any, by way of Action. Mr. Fazakerly argued on the other Side, and said he believed it was never imagined, if a Defendant is arrested upon a bad Writ, that the Plaintiff can take out a good one, whilst he is under the Arrest, and cure the Defect of the bad Writ upon it. For which Reason he hoped this Objection should prevail. Judge Page and Judge Lee said they were of Opinion that this Defect in the Writ of Execution was made good by the Method that had been taken. Judge Probyn was of Opinion to the contrary; however as the Court were not agreed in this Point, Serjeant Eyres went on to shew why he apprehended the second Objection ought not to prevail. He said the Writ of Error that was sued out, was a Writ of Error quod coram vobis. Those Writs of Error the Court will never allow, unless they see a sufficient Reason for that Purpose; and he apprehended they were no Superseatas even at Common Law, till Bail put in; at least this was the more clear since the Statute of Ch. 2. which requires Bail to be put in to all Writs of Error after a Verdict, and a Verdict there was in the present Case. He observed farther, that in all the Precedents they could find of these Writs of Error, Bail is put in,

Vide ante
285.

in, and particularly he produced one of Bail being put in by Mr. Forest the Attorney before Lord Chief Justice Raymond. Mr. Lacy on the same Side said that in Ven. 207. it was desired there that a Writ of Error quod coram vobis might be a Superfedeas in a particular Case upon putting in of Bail. It was not so much as offered there, that it should be a Superfedeas without it. And in the Folio Edition of Lilly's Practical Register 528. he observed it was said, that on Motion at the Side Bar the Court gives Leave that this Writ shall be a Superfedeas. Mr. Fazakerly on the other Side said that he conceived the Authority of the Case cited out of Lilly was strongly in Favour of their Side; for it is admitted by that Case, that by the Leave of the Court, this Writ of Error is a Superfedeas without Bail; and as to asking Leave of the Court for this Purpose, he knew no Law that required it. Then as to the Case in Ventris, the Authority of that he said was of no Weight; for there it is agreed that the Writ of Error that was brought would not lie by Law; it is desired by the Counsel that it may be a Superfedeas upon putting in of Bail, and the Court refused it. The Statutes that require Bail upon Writs of Error he observed were restrictive upon the Liberty of the People; and therefore have always been construed strictly; for this Reason it is, that they are held not to extend to Executors. It appeared then he said that the Arguments that have been used by the Defendant in Error, to shew that this Writ is no Superfedeas till Bail put in, were of little or no Weight. Then in order to shew that it was, he observed that there was no Officer to take Bail. The Master informed the Court, when he brought one of these Writs of Error once he put in none, and he never knew that the Practice of the Court required it. Mr. Fazakerly said too that he submitted it, that the Saying of Lord Coke in 3 Bull. 62. was strongly to that Purpose. Judge Lee said that a second Writ of Error is no Superfedeas to an Execution, and this appears by the Case of Butler and Lusitanoe. In the Case of Walker and Stokoe in Carthew, he said too, it appears that Bail was put in. Judge Page went out of Court before the Argument of this Objection was over; accordingly the Matter was ordered to stand over. Vide postea.

Oates and Nefs.

When an Arrest is irregularly made, how far the Court will not stay the Proceedings, by Reason of the Length of Time since the Arrest was made.

UPON the Master's Report the Fact came out to be, that a Bailiff had served a Writ upon the Defendant out of his Bailiwick; the Defendant gave the Plaintiff Notice of this, and still he proceeded. Yet because the Defendant did not complain to the Court of this Irregularity, till after the Declaration delivered, and Notice of Writ of Enquiry which was executed, the Judgment being by Default, and after Execution executed upon the final Judgment, the Court refused to set it aside. Accordingly the Rule of Reference to the Master was discharged.

Collins and Hodsdon.

MR. Gapper moved in an Ejectment, that the Landlord, Lord Weymouth, might be made a Co-Defendant, and that Mr. Tanner, upon whose Demise the present Ejectment is brought, might produce the original Lease of Lord Weymouth at the Trial; he being Lessee under Lord Weymouth, and having assigned Part of the Lands contained in that Lease to the Defendant. Judge Page said he very well remembered the same Motion, as the latter Part of this is made in an Ejectment, which he was Counsel in, in Lord Holt's Time, where the original Demise was by the late Queen Dowager, and it was refused. Accordingly this Part of the Motion was refused in the present Case; though the other Part of it was granted.

How far in an Ejectment the Court will not direct that Deeds should be produced at the Trial.

Elliot and Crisp.

THIS Matter coming on again, a new Affidavit was produced, and now Mr. Strange came to shew Cause, and said he did agree this Affidavit was a little more certain than the former; in the former it was only said that before Notice of Trial given the Witness went over to France generally; in this it is sworn he went over to Roan in Normandy. But he observed that Roan was not much farther off than York; and therefore the Plaintiff might have had him over by the Time of the Trial, if he had thought proper. Judge Probyn said the Plaintiff could have no Process to bring him hither; accordingly the Rule was made absolute.

Vide ante 24y.

Russel and Lacey.

ON Motion to justify Bail, Mr. Bootle, junior, said that the Notice was given but yesterday at two a Clock, and he submitted it, that by the Rule of the Court there ought to be a Day intervening; for which Reason he desired that the Bail might come again To-morrow, in Order that the Plaintiff might have an Opportunity in the mean Time to inquire after them. The other Side said that one of these Bail lived in Grays-Inn Lane, the other in Southwark, and was a near Neighbour, and well known to the Plaintiff. Upon which the Court asked the Master whether there was such a Rule of the Court; and he informed them that there was not. Accordingly the Bail were allowed to justify themselves now.

When Notice is given of justifying Bail, what shall be a sufficient Notice of that Sort.

Damon and Jolliffe.

Vide ante
285.

MR. Draper came now to shew Cause, and submitted it, that by the Rule of the Court the Venue in this Case could not be changed into Dorsetshire, and he had no Authority to consent. M^r. Banks on the other Side said, that he submitted it, the Rule should be made absolute. He observed, that where a Certiorari goes to remove a Cause above 5l. out of the Jurisdiction of Pool, which is sent up accordingly, and afterwards the Cause is sent down to be tried, the Trial is always had in Dorsetshire. He observed too, that the Freeholders in Pool actually vote for Representatives for Dorsetshire; though the Legality of those Votes is now under Dispute. Which Facts, he apprehended, were a sufficient Evidence, that Pool is considered as Part of that County. Judge Page did agree the Fact relating to the Certiorari to be as has been mentioned. But yet the Court said they always took it, that Pool was a Town and County of it self; for which Reason they discharged the Rule.

Godwyn and Brooks.

When a Scire
facias is
brought in
order to re-
vive a Judg-
ment, what
shall be said
to be a suffi-
cient Re-
turn Day, or
not, in such
Writ.

UPON a Scire facias to revive a Judgment, affirmed in the Exchequer Chamber, the Defendant appeared and demurred. M^r. Strange now took an Exception to the Return of the Writ. He said the Return was on Monday in five Weeks from the Feast of Easter, as if that Return, which is called the five Weeks from the Feast of Easter, was on a Monday. Now he observed, that that Return Day was on a Sunday; and so is Quinden' Sanctæ Trinitatis, and all others of the like Nature. To which Purpose he cited Show. 60. 6 Mod. 250. Salk. 626. and the Case of The King and Gumley. For this Reason he submitted it, that the Return ought to have been on Monday next after the five Weeks from the Feast of Easter; and as it was not so, the Writ was a void Writ upon the Face of the Record. M^r. Parker on the other Side said, that he apprehended the Defendant had waived the Exception by appearing and demurring generally to the Writ. M^r. Strange by Way of Reply said, that he conceived this Defect in the Return made the Writ absolutely void. This Defect appears upon the Face of the Record; and if so, the Demurrer to the Writ was the proper Way to take Advantage of it. The Court ordered this Matter to stand over. Vide postea.

Guibert and Jones.

THIS was a Scire facias, brought by the Plaintiff Mary Guibert, as Executrix to Philip Guibert, against the Defendant the Lady — Jones, as Executrix to the late Earl of Ranelagh. The Scire facias set forth, that Philip Guibert had had a Judgment against the late Earl of Ranelagh; that the Plaintiff obtained Judgment upon it against the Defendant as Executrix to him, unde consideratum est quod Maria Guibert recuperaret, &c. that thereupon the Plaintiff sued out a Fieri facias against the Defendant, to levy the Money, unde convictus est, upon the Goods of the Testator, the Earl of Ranelagh; that an Inquest was taken thereupon, who found that the Defendant had wasted the Goods of the Testator to the Amount of 900 l. and thereupon the present Writ required the Defendant to shew Cause, why this Sum of 900 l. should not be levied upon her own Goods. To this Writ the Defendant demurred; and Mr. Filmer now argued in Support of the Demurrer. All Writs which the Plaintiff does not declare upon, and which notwithstanding the Defendant is allowed to plead to, he submitted it ought to be as certain, as Declarations themselves. That he said was the present Case; and he conceived that the Writ was by no Means certain enough. There is no Scire facias set out, which the Plaintiff obtained her Judgment upon; and a Scire facias undoubtedly she ought to have sued out in order to have revived the Judgment of her Testator. The Judgment therefore, he conceived, must be taken to be void; and consequently all that was done upon it to be void likewise. He observed farther, that the Judgment is set out by way of Recital; it ought therefore to have been set out in the preterperfect Tense by the Words Consideratum fuit, whereas it is set forth in the present Tense by the Words Consideratum est. For this Purpose he cited Carth. 403. The Inquest too, he submitted it, did not appear to be rightly taken. The Writ upon which it was taken was returnable Die Lunæ prox' post Quinden' Sancti Martini, and was sued out in the Year 1728. That Return-Day in that Year was at least the last Day in Mich. Term, if not the Day after. The Inquest appears to have been taken on that Day, and it is not shewn to have been executed, before the Court was up, and consequently not before the Term ended. To the first of these Exceptions Mr. Fazakerly said, that the present Judgment is set forth, as all other Judgments of the like Sort are; the Writ was necessary and incident to the Judgment, and every Thing that was necessary and incident to it shall be intended. To the second he did agree, that where the Words Consideratum est are in the Form of a Judgment, they shall be taken in the present Tense; but in other Cases they shall be taken in their true and proper Signification, which is in the preterperfect Tense. To the last he said, it had been determined, that where a Writ, upon which an Inquest is to be taken, is returnable on a Day within the Middle of the Term, and the Inquest appears to be taken on the Day of the Return,

When a Scire facias is brought by an Executor to revive a Judgment which was recovered by his Testator, the certainty which is required in such Writ.

the

the Inquest need not appear to have been taken before the Court was up; yet there if it was taken after, it was without Authority; and consequently upon Motion would be set aside. He submitted it, that that Case did not differ from the present one; and thereupon prayed Judgment for the Plaintiff. Judge Probyn said that his present Opinion was, that the second Exception must prevail. He did agree, that the Words *Unde convictus est* were right, for this is the constant Expression in all Recitals of this Sort. But the constant Expression of all Recitals of Judgment is *Unde consideratum fuit*. Judge Page and Judge Lee were of a contrary Opinion. Accordingly Judgment was given for the Plaintiff, unless Cause before the End of the Term.

Anvert and Ennover.

How far it is
incumbent
on the Party
to alledge by
his pleading
that he made
an Offer.

IN Debt on Articles the Plaintiff declared, that by a certain Deed executed between the Defendant and her, she covenanted with the Defendant on her Part, to assign over to the Defendant at his proper Costs and Charges all her Right and Interest in a certain Tavern, called The Bell-Tavern, and two Messuages thereto adjoining, on or before the 24th of June next following the Date of the Deed. And farther the Plaintiff covenanted with the Defendant, that if he chose to enter into the same before the said 24th of June, he should have free Liberty so to do. In Consideration whereof the Defendant covenanted on his Part to pay to the Plaintiff the Sum of 209 l. 15 s. on the said 24th of June, and if he should enter into the Premises before that Day, he would pay all the Rent and Taxes that should be in Arrear at that Day. The Plaintiff avers, that the Defendant did not pay her this 209 l. 15 s. on that Day, nor any Part thereof, and for this she brings her Action. The Defendant pleads, that the Plaintiff did not offer any Assignment to him of the Premises on or before the Day mentioned in the Deed; nor did he before or at any Time since enter upon the Premises. To this Plea the Plaintiff demurs. Serjeant Chappel argued in Support of the Plea, and said, that he conceived the offering the Assignment was a Condition precedent to the Tender of the Money; and as it is not pretended, that the Plaintiff did make such Offer, he submitted it, she was not intitled to bring this Action. In the Case of Turner and Goodwyn, Trin. 13 Ann. the Defendant agreed to pay 1500 l. to the Plaintiff upon his assigning a Judgment. Lord Macclesfield declared there, that where there are no Words to determine the Priority of the Acts, a Middle Way is to be chosen. The Party is not obliged to make an absolute Tender of the Money first; but by such Words as these, I tender you the Money, so as you make an Assignment. And farther to this Purpose the Serjeant cited Salk. 171. Lutw. 244 and 490. Dyer 76. Mr. Draper on the other Side said, that in the present Case he submitted it there were mutual Covenants on both Sides, and in such Case the Acts to be done on the one Side shall not be considered as Conditions precedent to Acts to be done on the other

other. For this Purpose he cited Roll's Abr. 415. 2 Saund. 155. The Court inclined to be of Opinion for the Plaintiff. However this Matter stood over. Vide postea.

The King *and* The Inhabitants of the Parish of Langley.

MR. Stephens came to shew Cause why an Order of Removal should not be quashed. The Fact was specially stated in it, that Martha Brewer let herself for a Quarter of a Year to — in the Parish of Strowd, and if she and her Master should like one another, then the Agreement was, that she should live with him for a Year, and have 3 Pounds Wages. She entered upon her Service at the Beginning of the Quarter, continued on till the End of the Year, and received her 3 Pounds Wages. This was held below to be no Settlement. This Court was of a different Opinion; accordingly made the Rule absolute for quashing the Order.

How far a Person shall be said to gain a Settlement by living as a Servant.

Hutchins *and* Smith.

IN an Action brought by the Plaintiff, Assignee of a Commission of Bankruptcy, the Defendant demurred to the Declaration, for its not being set forth how he became Assignee. Mr. Agar senior argued in Support of the Demurrer, and said he did agree, if the Action had been brought against an Assignee, such a general Declaration would have been good; but as it is brought by one, he submitted it to be otherwise. Serjeant Chappel on the other Side said that most of the Declarations in Actions brought by these Assignees have been in this Way. Accordingly Judgment was given for the Plaintiff, unless Cause before the End of the Term. Judge Probyn absent.

When an Action is brought by an Assignee under a Commission of Bankruptcy, how far it need not be set forth in the Declaration, how he became Assignee.

Ray *and* Marriford.

IN Prohibition the Plaintiff declared, that the Defendant is belied against him in the Ecclesiastical Court, as Churchwarden of the Parish of Holling cum Withringsley in the County of York, upon a Rate for the Repairs of the said Parish Church; he set forth that the Lands, for which he was so rated, contained so many Acres of Meadow, so many Acres of Pasture, and averred that those Lands did not lie in the Parish of Holling cum Withringsley, but that they lay in the Parish of Hampton in the said County. He alledged that the Trial of the Bounds of Parishes belonged to the Temporal Courts, and not to the Ecclesiastical; and therefore prayed that the Prohibition might stand. The Defendant for a Consultation pleaded, that true it is, that the Lands mentioned in the Declaration did lie in the Parish of Hampton; but averred, that the Plaintiff occupied other Lands, which lay in the Parish of Holling cum Withringsley. He set forth that the Plaintiff was rated for those other Lands lying in the Parish of Holling cum Withringsley, absq' hoc, that

How far a Person shall be said to have taken an immaterial Traverse to a Declaration in Prohibition to a Suit for a Rate.

he was rated for those lying in Hampton. To this Plea the Plaintiff demurred, and shewed specially for Cause, that the Defendant had traversed Matter not traversable. Mr. Robinson argued in Support of the Demurrer. He said he did agree that the Plaintiff had alledged in his Declaration, that the Lands for which he was rated, lay in the Parish of Hampton; but the Alledging that they lay in Hampton was merely Matter of Form; in whatever other Parish they lay, so that they did not lie in Parish of Holling cum Withringsley, it was the same Thing to the Plaintiff; and therefore the Traverse was bad, for its confining the Plaintiff to prove that they lay in this particular Parish of Hampton. He said the Defendant should only have pleaded that the Plaintiff occupied other Lands in the Parish of Holling cum Withringsley, for which he was rated. There he ought to have rested; and then the Traverse, denying that he had other Lands in the Parish of Holling cum Withringsley, would naturally have come on in the Replication; which was the material Point to be put in Issue. To this Purpose he cited Saun. 206. Sid. 405. Lev. 263. Plow. 95. 1 Lev. 43. Sid. 227. and Carth. 116. Mr. Agar, senior, argued on the other Side; but Judge Page and Judge Lee inclined to be of Opinion that the Traverse was bad. However this Matter stood over, Judge Probyn absent.

Anonymus.

How far the Court will grant an Information against an Officer, for taking Fees which are not Legal.

MR. Abney moved for an Information against Mr. Robe, who was Clerk of the Market belonging to the King's Household; and likewise against Burden Anderson, who acted under him, for taking small Fees for the viewing of Weights and Measures within his Jurisdiction, whether such Weights and Measures upon such View were found deficient, or not. He did agree that the Jurisdiction of this Clerk of the Market is a very large one, that it extends ten Miles round the King's Court, wherever it resides, and so this Point was lately settled by a Clerk. But yet he said the Practice of gathering these small Fees all over this Jurisdiction was a very dangerous one; and was condemned as illegal by all the Judges of England, which appears by 4 Inst. 274. Accordingly the Affidavits were read; but upon reading them it did not appear that Mr. Robe was any ways assenting to this Practice; for which Reason a Rule to shew Cause was only made upon Burden Anderson; Judge Probyn absent. But afterwards it was made upon Mr. Robe likewise. Vide postea.

The King and Lloyd.

AN Information in the Nature of a Quo Warranto had been obtained against the Defendant, to know by what Authority he acted as Clerk of the Peace of the County of Cardigan. Mr. Fazakerly said that there was now depending before the Court a Conviction of the Sessions, by which the Defendant was removed from his Office; and till that be determined, the Defendant

dant cannot know what to plead to this Information; for which Reason he moved for Time to plead, till this Conviction is determined. The Court upon these Circumstances gave the Defendant till the second Day of next Term. Judge Probyn absent. *Vide postea.* 338.

The King and Jokam.

THIS was an Information against the Defendant at the Sessions upon the Statute of 5 & 6 Edw. 6. 14. (9.) for selling Cattle again after he brought them, without keeping them five Weeks. Mr. Filmer moved to quash it upon two Exceptions; First, for the Offence's appearing to have been committed after the Beginning of the Sessions. Secondly, for the Affidavit's, which the Statute of 21 Jac. 4. (3.) requires, appearing to have been made by a meer Stranger, and not by the Informer, as the Act directs. To the first he did agree that this Conviction was at an adjourned Sessions, and that the adjourned Sessions was after the Time when the Fact was committed; but the Sessions began the 9th of January last, the Fact was not committed till the 11th, and the Time for holding the adjourned Sessions, together with the Time for holding the Sessions at first of all, is considered but as one Day in Law. To the second he said, that the Statute of Jac. requires, that the Affidavit should be of Record before the Exhibiting the Information; accordingly this Affidavit is sent up with the rest of the Proceedings; so that this Exception appears upon the present Record likewise. For these Reasons the Court made a Rule to shew Cause. Judge Probyn absent. *Vide postea.*

When an Information is brought on a penal Statute, how far the Affidavit which 21 Ja. 4. sect. 3. requires, must be made by the Informer, or not.

Woodby and Holdfast.

ON Motion for Judgment in Ejectment, the Service of the Copy of the Declaration against the casual Ejector upon the Tenant appeared not to be made in the usual Way. The Tenant James Cook had no Wife, and absconded. The Service of the Copy of the Declaration was upon Nethercot his Maid-Servant, and she was desired by the Person that served it to give it her Master. The Maid-Servant made Affidavit that she did give it her Master, and that he said he would take Care of it. Upon these Circumstances the Court was of Opinion that this was a good Service; accordingly the Motion was granted. Judge Probyn absent.

What shall be said to be a good Service of a Declaration in Ejectment.

Goodwyn and Brooks.

MR. Parker moved now to discontinue on Payment of Costs; which the Court accordingly granted. *Vide ante* 306.

Weel and Smith.

Vide antea
203.

MR. Agar now moved that the second Writ of Execution might be set aside for its being taken out the 19th of May, which was within Term, and yet tested the last Day of last Term, returnable the 9th of June. He likewise moved that they might give Bail to this Writ of Error, that thereupon it might be a Superfedeas; and that the Defendant in Error might bring in the Roll and have the Judgment docketed, in order that the Plaintiff might assign his Errors. Judge Lee said, that certainly Bail must be put in upon this Writ of Error, as it is after a Verdict, as well as upon any other; and so this Point was determined in the Case of Merryfeild and Wellen, Trin. 1 G. 2. But Judge Page thought this Motion too special to be made without Notice; accordingly the Court directed M^r. Agar to file his Affidavits, give Notice to the other Side, and move this Matter again. Judge Probyn absent. Vide postea.

Darbey and Gould.

Vide antea
273.

MR. Strange now came to shew Cause upon this Rule; he said the Rule was that a new Record of Nisi prius might be made out agreeable to the Roll; and for this Purpose that there should be a new Writ of Nisi prius, and a new Writ of Distringas returned by Sir Isaac Shard and late Sheriffs of the County of Middlesex, and that the Verdict might be indorsed on the Back of the Record of Nisi Prius, according to the Notes of the Associate. He observed that this was a very extraordinary Rule, and such a one, as according to the Circumstances of the present Case, he believed no Precedent could Warrant. Sir Isaac Shard and the other Sheriff he said had for some Time been out of their Office; and if that was the only Objection, he thought the Court could hardly make a Rule upon them to sign a Return to this Writ. But he observed farther, that the Names of the Jurors could not now be known; it was not pretended that the Associate had taken Notes of them; and that was another Reason why the Return to the Distringas could not be made. He took Notice likewise, that the Chief Justice who tried the Cause was since dead; and this was a Circumstance which distinguished the present Case from all the Cases that had been cited on the other Side. M^r. Fazakerly submitted it, that the Cases that have been cited did well warrant the present Motion. That of Needham and Graynoe, Hill. 8 Geo. 1. was the principal one they relied upon. The Rule that was made in that Case was now read, and appeared to have been obtained on the Motion of M^r. Justice Probyn, when he was Counsel. It was that a new Writ of Nisi prius, and a new Writ of Distringas, and a Verdict might be entered a-new on the Back of the Record of Nisi prius, according to the Notes taken per Communem Clericum of Bristol. The Names of the Jurors he said are never entered on the Back of the Record of Nisi prius, but only where there is a Tales, which was not had in the present Case.

Case; and therefore there could be no Occasion, that the Associate should have taken a Note of the Names of the Jurors. The Associate has made an Affidavit, that he did take a Note of the Verdict; which he apprehended was the best Evidence that could be had, as the present Case is circumstanced. The Court was of the same Opinion; accordingly the Rule was made absolute. Judge Probyn absent.

Murrel and Anderson.

IN Trespass brought against the Defendant for entering the Plaintiff's Shop, and taking away two Shirts, the Defendant justified, for that he was Chief Bailiff of the Liberty of Stepney, and as such all Amercements within that Liberty were due to him; that an Amercement of 3 s. 4 d. was set upon the Defendant living within that Liberty; that Process issued out of the Exchequer to levy it, directed to the Sheriffs of London and Middlesex, and that the two Shirts were taken on Account of the 3 s. 4 d. being refused to be paid. To this Plea there was a Demurrer. But the Court thought it sufficient, notwithstanding it was not set out on what Account the 3 s. 4 d. was due. Judge Page said, these Allowances to Bailiffs are settled in the Office of the Foreign Apposer in the Exchequer, he thought therefore, that that Court was the proper Place for the Plaintiff to apply to, and not to this. Accordingly Judgment was given for the Defendant, unless Cause.

The Fees which are due to Bailiffs for executing a Process.

Wirley and Budder.

THE Plaintiff having brought three several Actions against three several Indorsers of one and the same Note, Motion was made, that the Plaintiff might make her Election against which of the three several Defendants she would proceed, and that Proceedings might be said against the other two. Judge Page said that the Plaintiff could not take out Execution but against one of the Defendants; however thought that the Plaintiff had a Right to proceed to Judgment against all. Accordingly the Motion was refused. Judge Probyn absent.

When several Actions are brought for one and the same Cause, how far the Party shall have a Right to proceed to Judgment in all of them.

The King and Cotton and others.

ON Rule to shew Cause, why an Information should not be granted against the Defendants, the Fact came out to be in the Manner following. A Court Leet was held for the Liberty of Westminster lately, in which Mr. Cotton, one of the Defendants, sat as Deputy-Steward. Another Court was likewise held at the same Time and Place by Virtue of an Act of Parliament passed the 27th of Queen Elizabeth, in which all the Defendants sat as Judges. That Statute gives the Defendants Power to inquire into all Breaches of the Peace,

How far the Court will grant an Information against a Person for abusing a Judge of an inferior Court.

and certain other Offences arising within the Liberty of Westminster. By that Statute there is a Power given them to Fine and Imprison; and if they do imprison, they are required to give Notice of the Imprisonment within Twenty-four Hours to some Justice of Peace for the County of Middlesex. When these Courts were sitting a Complaint was made before them of a Breach of the Peace upon the Watchmen by one Smith, who was Constable that Year, and a wealthy Man in the Liberty of Westminster. Smith was summoned to appear before them, and he accordingly attended. When he came there he behaved himself in a very contemptuous Manner towards the Court, several Times deriding Mr. Cotton by the Name of Jack Cotton, calling for Drink, and setting himself in the Place of one of the Justices. For this Contempt they told him they would commit him. Upon that he desired to give Bail; one Person swore he offered to be Bail for him; the Justices not approving of him, Smith asked them, whether they would have Dukes, Lords or Earls; whichever of them they would have he could procure to be bail for him. The Defendants made him no Answer, but ordered him to be committed for Twenty-four Hours, and in the mean Time they gave Notice of this Commitment to two Justices of the Peace for the County of Middlesex, who accordingly bailed him. Upon this State of the Case Mr. Strange, as Counsel for the Defendants, submitted it, that the Rule ought to be discharged. He said he did agree, that possibly the Commitment for Twenty-four Hours might not so strictly be justified; but commit the Defendants certainly could do. A Steward of a Court-Leet may do it for a Contempt committed in Court, and so has it often been determined. Mr. Cotton was Deputy-Steward; and therefore the Commitment might well be justified, as to him. The Defendants have all of them likewise a Power given them to commit for Breaches of the Peace. That contemptuous Behaviour before the Court, he submitted it, was a Breach of the Peace; and therefore the Commitment might well be justified, as to them all. And even as to the Time of Twenty-four Hours, he observed that the Act of Parliament gives them Power to commit; and within Twenty-four Hours they are to give Notice to some Justice of Peace; the Defendants have committed for Twenty-four Hours; if this be a Mistake, at least it is such a one, that might easily be made. It is said then, that Smith did offer Bail, and the Justices refused to bail him. In Answer to this, Mr. Strange observed, that but one Person by Name he did offer; that Person the Justices thought not sufficient; and besides, for a Contempt committed in Court, he did not know that the Court was bound to bail him. Mr. Wynn argued on the same Side, and for Authorities relied upon Fitz. Nat. Brev. English Translation 182. 7 Crompt. Rep. 11. 44 and the first Case in Vent. Rep. Serjeant Belfield argued on the other Side, and submitted it, that what Mr. Smith did was only a Misbehaviour; the most therefore, that the Defendants could have been warranted in doing, would have been to have committed him, in case he had not offered Bail, and that not for a determined Time, but generally

rally only, and then to have given Notice. Judge Page said that he did agree, that the Commitment for that determined Time might be illegal; but his Opinion was, that the Justices were a Court of Record by the Statute of Eliz. in as much as they have a Power given them to Fine and Imprison; and for a Contempt done in such Court undoubtedly the Judges of it may commit. He said likewise in the present Case he took it the Defendant was guilty of a Breach of the Peace; not for calling one of the Judges Jack Cotton; (for Words perhaps will not make such an Offence) but for sitting in the Place of one of the Judges. If any Man should do that in this Court, he should think him to be guilty of a Breach of the Peace. And if this was so, the Justices had Conscience of this Offence within the express Words of the Statute of Eliz. But admitting, that this Offence should be considered as a Contempt only done in a Court of Record, he thought that Court was not bound to bail him; and if such Return was made to a Habeas Corpus, he thought this Court could not do it neither. Judge Lee said he believed the regular Way in these Cases of Contempts was for the Court to set a Fine upon the Party, and to commit him for not paying it. However the most that could be objected against the Defendants was, that they have been guilty of a Mistake in Judgment. Accordingly the Rule was discharged for the present Information. Judge Probyn absent.

Weele and Smith.

MR. Agar now moved this Matter again upon Notice. ^{Vide ante} Accordingly the Court allowed him to put in Bail; and ^{285.} made a Rule to shew Cause, why the second Writ of Execution should not be set aside, and the Roll brought in, and the Judgment docketed, in Pursuance of the other Part of the Motion. Judge Probyn absent. ^{Vide postea.}

The King and Pinder.

MR. Fazakerly moved, that a Rule for quashing a Capias ^{How far the} with Proclamations might be discharged, for its being ^{Court will} made above a Twelve-month ago, and never drawn up, ^{not discharge} nor served during all that Time. Judge Page said, that he ^{a Rule by} thought Delay of it self only was never a Reason for ^{reason of the} granting such Motion. Accordingly it was refused. Judge ^{Length of} Probyn absent. ^{Time since} ^{it was drawn} ^{up.}

Wells and Southwell.

Of what
Term com-
mon Bail
must be filed.

ON Motion to set aside a Judgment, for the common Bail's not being filed for the Defendant the same Term, in which the Writ was returnable; the Writ being returnable the first Day of Hil. Term last, and the common Bail not being filed till Easter Term following; the Court referred this Matter to the Master. Judge Probyn absent.

The King and Taylor.

Vide ante
280.

MR. Wills now informed the Court, that though the Form of the Judgment after the Ideo consideratum est was altered according to the Directions of the Court; yet the Prayer of that Judgment continued as it was before. He submitted it, that the Prayer of the Judgment by the Party, entered upon the Roll, ought to be agreeable to the Judgment pronounced by the Court; accordingly moved, that this might be amended likewise; and a Rule was made to shew Cause. Judge Probyn absent. Vide postea.

Anonymus.

What shall
be said to be
a sufficient
Notice, or
not, to Tru-
stees of a
Turnpike.

MR. Lacy moved to quash an Order of Sessions made for the Removal of a Turnpike upon the Road leading from Fulham to Hamersmith. His Exception taken to the Order was, that Notice of the Complaint to the Sessions against the Trustees of this Turnpike was only given to five of them, whereas there are near seventy appointed by the Act; and in Default of their appearing to answer the Complaint upon this Notice the Order was made. He submitted it, that Notice ought to have been given to each of the Trustees in particular, or at least, when they have a general Meeting. But the Order was not in Court; accordingly no Rule was made at present. Vide postea.

Anonymus.

When an Ac-
tion is
brought up-
on the Sta-
ture of 21
H. 8. 13. re-
lating to Ec-
clesiastical
Persons,
what kind of
Pleas will be
allowed by
the Court to
be pleaded in
Bar of such
Action.

IN an Action qui tam brought upon the Statute of 21 H. 8. 13. for Non-residence, and for buying Goods by way of Merchandize, in order to sell again, Mr. Agar moved for Liberty to plead as to the Non-residence, that the Defendant was a Chaplain retained, that thereby he was enabled to hold two Benefices; and that he resided upon his other Benefice; as to the Buying Goods to sell again, he moved to plead, that the Goods were bought for the Use of his Family; and likewise he moved to plead, as to the Whole of the Declaration, Nil debet. Accordingly the Motion was granted. Judge Probyn absent.

The King and The Mayor of Shrewsbury.

MR. Fazakerly moved, that the Officer, that has the Custody of the publick Books of the Corporation, might attend with them at the Trial, upon an Affidavit, that there was a Rasure in one of them. Judge Page said, that he never knew that the Court made an Order upon the Officer in such Case to attend with any more of the Books, than the Affidavit swears there are Rasures in. And that too is never granted, but upon the Party's being at the Costs of it, that makes the Motion. Accordingly a Rule was only made in this Case, that the Officer should attend with that particular Book, at the Prosecutor's Expence. Judge Probyn absent.

When there is occasion to produce a Book in Evidence, and there are Rasures in it, what kind of Orders shall be made by the Court concerning the producing it.

Tasker and Keary.

ON Rule to shew Cause, why an Umpirage should not be set aside, M^r. Fazakerly said, that there had been two Exceptions taken to it; one, that the Umpire has only compleated what the Arbitrators begun; the other, that the Umpire made his Umpirage upon the State of the Facts made to him by the Arbitrators, without convening the Parties before him. He observed, that the Submission to this Award had been made a Rule of Court according to the Statute of 9 & 10 W. 15. and before any Exceptions could be argued to such Award, he submitted it, that there ought to have been a Suggestion made of them upon the Roll. This has been omitted in the present Case, and therefore on that Account he conceived the Application to this Court was irregular. Then as to the Exceptions themselves he said, that the Arbitrators determined the whole Matter referred to them, excepting one single Part of it, which related to an Account of Interest, which was to be taken. To settle this Matter they appointed an Umpire, as they had a Power by the Submission to do. He took the Facts to be, as the Arbitrators had stated them; and made his Umpirage concerning that Account of Interest only accordingly. The Statute that has been mentioned, he observed, requires that no Umpirage shall be set aside, but for some Misbehaviour in the Umpire; there appeared to be nothing of that in the present Case; but every Thing was fair and regular; and therefore he hoped, the Rule should be discharged. M^r. Strange argued on the other Side, and said, that he took it to be a known and certain Rule, that the Parties to the Submission must have Notice given them, before the Arbitrators make their Award. In the present Case they had not that; but the Umpire made his Umpirage upon hearing the Arbitrators only, and not hearing the Parties. The Umpire too must have the Whole of that Authority, which the Arbitrators had; this he had not in the present Case; and for these Reasons he hoped the Umpirage should be set aside. Judge Page said, that he did agree there was one Case soon after the making of the Statute

How far an Umpirage shall not be good, by Reason of its only compleating what the Arbitrators begun.

of William, wherein the Court held, that such Suggestion upon the Roll, as has been mentioned, was necessary. But that was the single Case, he believed, where it was ever done; and therefore the want of that could be no Objection against taking the present Exceptions. He said he took it, that an Empire must have the whole Authority which the Arbitrators had, and cannot have Part of it only. The Empire too must make his Empire upon hearing the Parties to the Submission, and not upon hearing the Arbitrators only. And therefore for these Reasons he thought the present Empire ought to be set aside. Judge Lee said that he was of Opinion, the Parties to the Submission ought to have Notice given them before the Arbitrators make their Award. He agreed likewise, that the present Empire ought to be set aside for their hearing the Arbitrators only, and not the Parties of the Submission. He said farther, that he was of Opinion, the Empire could not determine Part, without determining the Whole. Accordingly the Rule was made absolute. Judge Probyn absent.

Anonymus.

Vide ante.
316.

MR. Lacey moving this Matter again, Judge Page declared his Opinion, that, unless some Confederacy could be shewn between those Trustees, that have had Notice given them, and those that complained to the Sessions, the Notice was a good Notice. Judge Lee agreed the same. Accordingly no Rule was made upon this Motion. Judge Probyn absent.

Griffith and Allcock.

When a Person who resides in a County Palatine of Chester is served with a Copy of a Latitat, how far it is necessary that he should be likewise served with a Copy of a Mandate from the Chamberlain.

MR. Bailly moved, that the Irregularity of a Judgment might be referred to the Master, by Reason that the Defendant was only served with a Copy of a Latitat directed to the Chamberlain of the County Palatine of Chester, and not with a Copy of a Mandate from the Chamberlain. Accordingly the Motion was granted. Judge Probyn absent. Vide postea.

Gregory and Warren.

ON Rule to shew Cause why Proceedings upon a Scire Facias against Bail should not be staid, pending a Writ of Error in Parliament, upon the same Terms as were allowed in the Case of Myre and Arthur; the Fact came out to be in the Manner following; In Trinity Term last the Plaintiff recovered a Judgment for 987 Pounds. Writ of Error was brought in the Erchequer Chamber, and the Judgment affirmed. A Capias ad satisfaciendum taken out against the Principal; two Scire Facias taken out against the Bail. On the Day before the Return of the second, the present Motion was made, and the Writ of Error allowed in Parliament Yesterday. Mr. Serange came now to shew Cause, and said that he has often heard it said by the Court, that they would never extend these Rules in Favour of Bail, farther than was done in the Case of Myre and Arthur. He said he had a Note of that Case; and it appeared there, that the Motion was made in Favour of the Bail, before any Scire Facias taken out; in the present one it is not made till the Day before the Return of the second. The Court said where there is no Writ of Error sued out, the Bail may surrender the Principal at any Time before the Return of the second Scire facias. They said they thought there was the same Reason, where the Writ of Error is brought, that the Bail may at any Time before the Return of the second Scire Facias apply, that Proceedings may be staid against them, till the Event of the Writ of Error determined, upon entering into a Rule, according to the Case of Myre and Arthur, to pay the Money recovered, or surrender the Principal within four Days after Affirmance of the Judgment. Accordingly the Rule was made absolute. Judge Probyn absent.

When a Writ of Error in Parliament is brought, upon what Terms the Court will stay Proceedings against Bail pending such Writ of Error.

The King and Mathews.

THE Defendant having been brought up by Habeas Corpus Discreet to the Keeper of the Gaol in Oxford, the Return was that the Defendant was committed by Order of the Vice-Chancellor, till he pays the Costs that were taxed, and afterwards should be taxed in a Suit instituted before him. Serjeant Hawkins submitted it, that this Commitment was illegal, by Reason that Part of the Costs were not taxed, and perhaps never would be; so that this was in the Nature of an Imprisonment for Life. Accordingly he moved that the Defendant might be discharged, or at least be bailed; and he said he had given Notice of this Motion to the Vice-Chancellor, and to the Plaintiff in the Suit below. Judge Page and Judge Lee agreed, that that Part of the Commitment in relation to the future Costs, was certainly illegal; but doubted whether the Commitment might not stand good for the other Part of it. They said this was a Point of too great Difficulty to be determined the last Day of a Term. Accordingly ordered him to be remanded. Judge Probyn absent.

How far a Commitment shall be said to be bad by Reason of the Uncertainty of the Time for which the Party was committed.

Tho-

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How far a Commitment shall be said to be bad by Reason of the Uncertainty of the Time for which the Party was committed.

Tho-

Thomas and Bishop.

How far
Bill of Ex-
change shall
be said to be
void, by Rea-
son of the
Uncertainty
of the Fund,
out of which
the Money is
required to
be paid.

IN an Action brought by the Plaintiff upon a Bill of Ex-
change, the Bill was drawn in these Words, May 29,
1732, Sir, At 30 Days Sight pray pay this my first Bill of Exchange,
the second not paid, unto *John Somerville*, or Order, the Sum of 200
Pounds Sterling, Value received of him, and place the same to the Ac-
count of the York-Buildings Company, as by Letter of Advice. To
Humphry Bishop, Cashier of the York-Buildings Company, at their
House in *Winchester-Street*, London. The Defendant accepted this
Bill, and signed his Name to it *Humphry Bishop*. The Trial
in this Cause came on at the Sittings before Judge Page, and
he directed the Jury to find a Verdict for the Plaintiff, which they
accordingly did. *Mr. Kettleby* now moved for a new Trial; and
submitted it, that as the Bill was drawn on the Cashier of the
York-Buildings Company, on the Company's Account, the Action
ought to have been against the Company, or at least against
the Defendant, as Servant to them, and so this ought to have
appeared upon the Face of the Declaration. But the present
Declaration is against the Defendant personally in his own
Right; and therefore he submitted it, that the Evidence did not
maintain it. The Court said they could not give an Opinion
upon this Matter, without seeing the Bill itself; and the Plain-
tiff's Attorney had not the Bill here; accordingly this Matter
stood over. Judge Probyn absent. Vide postea.

The King and Taylor.

Vide antea
316.

THE Counsel for the Prosecutor having now shewn Cause
upon this Rule, Judge Page declared his present Opinion
to be, that the Court could not alter the Prayer of the Judg-
ment; however the Rule was enlarged, that this Point might
be farther considered of. It was then said by the Defendant's
Counsel, that the Prosecutor had not altered the Judgment of
Ouster itself to this Day. The Court upon that made a Rule
that it should be altered immediately. They said they would so
far give Directions in it, that the Judgment should be, that the
Defendant should be fined upon his Confession of the Usurpa-
tion for the Time mentioned in his Plea. But declared they
would not give Directions about the Form of Words, which
the Judgment should be penned in.

Weele and Smith.

Vide antea
315.

THIS Matter coming on again, the Court made the Rule
absolute for setting aside the Writs of Execution, by Rea-
son they recited a Judgment recovered in the Common Pleas,
and they allowed the Writ of Error to be a Superfedeas on
Affidavit of the Truth of the Facts to be assigned for Error.

The King *and* Pixley.

Bury-Assizes. **T**HIS was an Indictment against the Defendant upon the Statute of 6 G. 1. for assaulting Custom-house Officers in the Execution of their Office. This Indictment had been removed up into the King's Bench by Certiorari, and was sent down to be tried at Nisi prius. Upon Evidence the Defendant's Counsel objected that the Persons assaulted ought to shew the Authority, which they acted under as Custom-house Officers. The Judge said, that he well remembered there was a Statute which made it unnecessary. Accordingly the Objection was over-ruled. Vide ante. 273.

Farr *against* Crisp and others.

Bury-Assizes. **I**N Replevin the Defendants avowed the taking under a Warrant from the Commissioners of Sewers. Mr. Proctor objected that the Defendants ought to produce the Inquisition, which is necessary to be taken by the Commissioners, before any Warrant can be made out. But the Judge did not allow of this Objection; upon which Mr. Proctor made another, that the Warrant appeared to be illegal upon the Face of it; for it required the Defendants to levy a certain Penalty upon such Persons, as should refuse to pay the Rate, and did not mention the Names of these Persons. This Objection the Judge allowed of; accordingly the Plaintiff was nonsuited. When a Justification is made under a Warrant from Commissioners of Sewers, how far such Warrant shall be said to be legal, or not.

Term. Mich.

7 Geo. II. 1733.

Naylor and Boyce.

How far a
Rule to as-
sign Errors
shall be ne-
cessary to be
given, or not.

IN a Writ of Error upon a Judgment in the Common Pleas the Defendant did not give Rules to the Plaintiff to assign his Errors, but served him with a Scire facias quare executionem non, to which the Plaintiff pleaded Nul tiel Record; the Defendant joined Issue with him upon that, and delivered him a Copy of the Issue with two Days Notice to verify the Record, and for want of his paying for it signed his Judgment upon the Scire facias. The Plaintiff told the Defendant, that he was irregular in not giving Rules to assign Errors; and thereupon the Defendant did give such Rules in Pursuance of which the Plaintiff assigned his Errors; the Defendant pleaded In nullo est Erratum; the Paper-Book was accordingly made up; and the Errors intended to be argued this Term. But notwithstanding this the Defendant took out Execution on the Judgment upon the Scire facias. Upon which Mr. Fazakerly moved, that the Judgment and Execution might both be set aside. The Judgment he said was irregular, because there were no Rules given to assign Errors; and likewise, because there ought to have been four Days Notice to verify the Record. But, if the Judgment itself was not irregular, at least, he said, the Execution was. For the Writ of Error was clearly depending at the Time the Execution was taken out; and so the Party himself took it, by giving Rules to assign Errors, and thereby waiving the former Judgment. The Court declared their Opinions, that the Judgment was clearly regular, by Reason that the Plaintiff did not pay for the Copy of the Issue. And Judge Probyn said his Opinion was, that two Days Notice was sufficient, in as much as the Proof of the Issue lies in this Case upon the Defendant; though he did agree it to be otherwise, where the Proof of the Issue lies upon the other Side; which the Master confirmed. The Court were farther of Opinion, that the Execution was regular likewise; and yet they did agree, that the Writ

Writ of Error was depending; accordingly the Motion was refused.

Doe and Roe.

MR. Hopkins moved to discharge a Rule of Reference to the Master, by Reason of its being last Easter Term, and no Appointment taken out upon it. Which the Court accordingly did.

When a Rule of Reference is made to the Master, how

far the Court will discharge it by Reason of their being no Appointment taken out upon it.

Price and Webb.

MR. Draper moved to set aside a Judgment, by Reason that the Declaration was delivered but the last Day of last Term; whereas it ought to have been delivered four Days before the End of it, the Defendant being an Attorney. Accordingly a Rule was made to shew Cause.

When an Attorney is sued, and a Declaration delivered against him, within what

Time it is that the Plaintiff will be intitled to sign his Judgment for want of a Plea.

Mariner and Thrustout.

IN Ejectment, to which the Tenants had not appeared, the Common Serjeant moved, that the Declaration might be amended, by striking out the Words three Acres of Ground, and putting in the Words three Acres of Arable Land in the Room of them; and cited a Case Trin. 2 Geo. 1. where a Declaration in Ejectment was amended before Appearance; the Declaration delivered being de Messuagio five Tenemento, and the Words five Tenemento struck out. Judge Page agreed that Case; because there nothing was added to the Declaration. But here the Motion is made to add one Description of Land in room of another; and there can be no Way of compelling the Tenant to appear to such Declaration, in as much as he was never served with it. Upon which the Common Serjeant moved, that the Words three Acres of Ground might be struck out of the Declaration, without inserting the other Words; and that Motion Judge Page and Judge Lee, being only in Court, granted.

How far a Declaration in Ejectment shall be allowed to be amended.

The King and Jokam.

MR. Lacey came now to shew Cause, and said, with regard to the first Exception, that he did agree, if the Adjournment had not appeared upon Record, the Exception would have been fatal. But as the Adjournment does appear, the Conviction is equally good, as a Declaration is, where the Cause of Action arises in the same Term as the Declaration is of, and

Vide ante 311.

and there is a Special Memorandum. To the second he observed, that the Affidavit appears upon Record to have been made by John James of the City of London Butcher, Relator in this Cause, and the Statute of Jac. allows the Affidavit to be made either by Informer or Relator. Besides, he said it has been held, that such Exception cannot be taken Advantage of upon a Writ of Error, for which Purpose he cited 1 Cro. 316. 4 Inst. 272. and he submitted, it could not be taken Advantage of in this Way neither. And farther he observed, that this was an Information qui tam, wherein the Plaintiff may be nonsuited, and is in the Nature of a Civil Suit; and therefore could not be quashed. As to the first Exception Judge Page and Judge Lee, being only in Court, agreed, that it had received a proper Answer. To the second they agreed too, if it should be allowed, that it could not be taken Advantage of upon a Writ of Error. But Judge Page said his Opinion was, that the Words Informer or Relator may signify different Persons; the Informer, the Person that makes the Complaint, the Relator, the Person on whose Testimony it is made; and therefore he thought the Affidavit made by either of them was good. He took Notice farther, that an Information qui tam was as much a Civil Suit as an Action of Debt qui tam; and therefore the Information could not be quashed. Judge Lee said, that though sometimes the Words Informer or Relator may signify different Persons, yet in this Statute he doubted whether they did not signify the same. And if the Affidavit was bad upon this Exception, he thought that this was the proper Manner of taking Advantage of it. Accordingly the Court not agreeing in Opinion, this Matter was ordered to be spoke to again. Vide postea.

Wilcox and Cockel.

How far the Court will not stay Proceedings in an Action upon a Bail-Bond, till Bail above is actually put in.

MR. Gapper moved that Proceedings upon the Bail-Bond might be staid upon putting Bail above. Judge Page said, that the Court could not grant this Motion till Bail actually put in. Mr. Gapper answered, that he made this same Objection in a like Case about two Years ago, and Lord Raymond over-ruled him in it, saying that of late the Court had allowed these Motions upon putting in Bail above. But Judge Probyn and Judge Lee agreed with Judge Page; accordingly the Motion was refused.

Anonymus.

How far an Infant shall not be capable of being chosen a Capital Burgess of a Corporation.

MR. Abney moved for an Information in the Nature of a Quo Warranto against one to know by what Authority he exercised the Office of Burgess in the Town of Caln in the County of Wilts. The Objection against him was, that he was an Infant at the Time of his Election. The Court said, that Infants were capable of sitting in the House of Commons, till a late Act of Parliament was made

made against it. However they made a Rule to shew Cause.
Vide postea.

Hughes *and* Stout.

IN an Action of Covenant the Plaintiff made Affidavit that the Defendant was his Tenant, and that he had broke several Covenants in his Lease to his Damage of 100 l. and thereupon held him to special Bail. Mr. Strange upon this moved, that the Defendant might be discharged on common Bail; because the Damages were merely uncertain, and the Plaintiff had obtained no Order of a Judge, whereby special Bail was required. In Covenant for Rent he did agree it was otherwise. Accordingly a Rule was made to shew Cause; and afterwards it was made absolute.

How far a Defendant shall not be held to special Bail, without an Order of a Judge for that Purpose.

Anonymus.

MR. Prime moved, that certain Articles of the Peace, that were exhibited against one Mr. Brindloe and Mary Perkins his Servant, might be set aside. With regard to Mr. Brindloe, he said, that there was no Fact charged upon him in the Articles. The Woman that exhibited them, has only sworn that he threatened to do her Business, and said some other general Expressions to her, by Means of which she swears, she went in Fear of her Life. Articles of this uncertain Nature, he submitted it, were bad upon the Face of them. But he had Affidavits besides which explained the Sense those Words were spoke in, he would do her Business for her, and shewed they ought to receive a very innocent Construction. With regard to Elizabeth Perkins, he apprehended, that there was no Charge at all sworn upon her. For the Words are, That the said Brindloe together with Elizabeth Perkins have several Times, &c. Judge Page and Judge Probyn said, that they never knew Affidavits to be read in such Cases as this; accordingly were of Opinion, that they ought not. Judge Lee however said, that where an Expression in Articles is in it self doubtful, he did not see the Reason why they might not. However they all agreed that there was another Expression in the Articles, which was clearly sufficient; and that was, That Mr. Brindloe threatened the Complainant to throw her into a Horse-Pond. Accordingly Mr. Brindloe gave Bail to these Articles. But the Servant was discharged by Consent.

How far the Court will not set aside Articles of the Peace, notwithstanding some Uncertainty in them.

Anonymus.

How far Ex-
ceptions for
superfeding
a Writ, must
be taken be-
fore the Re-
turn of it.

MR. Abney moved that a Writ of Mandamus might be super-
seded, which was directed to M^r. Pilkinton and another, O-
verseers of the Parish of St. George's, requiring them to deliver
over to M^r. Bletlow and another all publick Books, Papers and
Writings relating to the Poor of that Parish, which were in their
Custody. In the Case of Utoxeter, he said it was lately deter-
mined, that a Certiorari would not lie to remove Poor's Rates;
and by the same Reason, he submitted it, the present Mandamus
would not. He observed farther, that there was a Contest now
depending between these very Persons concerning the Right of
Election; and as M^r. Pilkinton and the other Person had got
the Possession of the Books, the Court would certainly not
take it from them. Judge Probyn said, that the Reason why
the Court does not grant Certiorari's to remove Poor's Rate is,
because there is an Appeal given to another Jurisdiction; and
therefore till an Order of Justices is made upon them, the
Court has nothing to do with them. But in the present Case,
when the Office of Overseer determines, which is within a li-
mited Time, it is certain that the Books ought to be delivered
to his Successor; and therefore undoubtedly the Court will
grant a Mandamus for that Purpose; which the rest of the Court
agreed to. As to the Fact concerning the Contest about the E-
lection, they said that would properly come upon the Return;
and Judge Lee said, another Reason why the Court would not
supersede this Writ of Mandamus was, because the Return was
out; and he said it was determined in the Time of Lord Ray-
mond, that an Exception for superfeding a Writ must be taken
before the Day of the Return of it.

Anonymus.

How far an
Information
in the Nature
of a Quo
Warranto
shall be
granted a-
gainst a Per-
son, by Rea-
son of his
not being
chosen into
his Office at
the Time he

MR. Fazakerly moved for an Information in the Nature of a
Quo Warranto, against William Poole for exercising the Of-
fice of Bailiff in the Town of Liverpoole. The Objection a-
gainst his Election was, that by the Charter these Bailiffs are
appointed to be chosen on St. Luke's Day, which is the 18th of
October. The Corporation assembled accordingly on that Day.
But notwithstanding this the Mayor, M^r. Brereton, at 10 a
Clock in the Morning of that Day adjourned to the next Day,
and then William Poole was elected. Accordingly a Rule was
made to shew Cause. Vide the next Case.

cught to have been.

Anonymus.

MR. Strange now moved for an Information against M^r. Brerton, for adjourning the Assembly in the Manner that is mentioned in the foregoing Case; and said this was plainly an Offence within the 11th of Geo. 1. Accordingly the Court made a Rule to shew Cause in this Case likewise. Vide the former Case.

How far the Court will grant an Information against a Person for adjourning an Assembly illegally.

Markweth against Reynolds and Westwood.

IN an Action of Assault and Battery, the Defendants severed in their Justification. Reynolds pleaded De son Assault, and upon that Plea Issue was joined. Westwood pleaded that he was Servant to Reynolds, and that the Plaintiff having assaulted Reynolds at a certain Time and Place, he did then and there assault the said Plaintiff in Defence of his Master; to this Plea there was a Demurrer. M^r. Agar submitted it, that the Plea of the Servant was bad for two Reasons; First, that the Servant could only justify defending his Master, and not assaulting the Plaintiff in the Defence of him; for this Purpose he cited 11 H. 6. 8. Secondly, that the Assault of the Plaintiff might have been of a Time past; for the Words of the Plea are, that the Plaintiff having assaulted Reynolds. M^r. Moreton argued on the other Side; with Regard to the first Exception he submitted it that the Plea was well warranted by the Authorities in the Books; for this Purpose cited 9 Edw. 4. 48. b. Bro. Abr. 283. b. Pla. 189. Rol. Ab. 546. Salk. 407. With Regard to the second, he said the Defendant has pleaded that he did then and there defend his Master; which he submitted it was sufficient Certainty, that the Defence was at the same Time and Place that the Assault was. The Chief Justice, with the rest of the Court, was of Opinion, that the Plea of this Defendant was not good; accordingly as to him, Judgment was given for the Plaintiff; Judge Lee absent.

When an Action of Assault is brought, and one of the Defendants justifies as Servant to another, how far such Justification shall not be said to be good.

Griffith and Allcock.

THIS Matter now coming on upon the Master's Report, and he reporting the Fact to be according to the Exception before taken; Serjeant Birch submitted it, that the Judgment was irregular. Before the Statute of 12 Geo. 1. for preventing frivolous and vexatious Arrests, he said he believed it would not be contended, but a Mandate from the Chamberlain to the Sheriff was necessary, before the Process directed to the Chamberlain could be executed; for this Purpose he cited 4 Inst. 210. Salk. 500. And he submitted it, that the Mandate was equally necessary in Cases within this Act of Parliament; because the Words of the Act are general, and the Intent of them could not be to take away the Privilege of inferior Jurisdictions. M^r. Fazakerly on the other Side said, that by the same Reason that

Vide ante 318.

that it was insisted on in this Case, that a Warrant from the Chamberlain was necessary, it might be insisted on, that a Warrant from the Bailiff of every Liberty was necessary, before a Copy of the Process could be served within his Bailiwick. But he said the constant Practice has been otherwise since this Act, in those other Cases; and therefore he submitted it, that it was not necessary in the present one. The Chief Justice said that a Mandate from the Chamberlain could not be called a Process; because it issues out of no Court; and therefore by this Act of Parliament it could not be necessary that the Party should be served with a Copy of it. He said farther, that he did not think this Case differed from that, where a Bailiff has a Liberty of Retorna Brevium. Judge Page and Judge Probyn declared themselves too to be of the same Opinion. However, as this was a Construction of a new Act of Parliament, they said they would consider of it again, before they gave a final Opinion. Judge Lee absent. Vide postea.

The King and Tallard.

How far Acts of Immodesty shall be laid to be indictable, or not.

THE Defendant was indicted for encouraging Hacon to run naked from his Waist upwards, in Chapel Field in the City of Norwich, which Hacon did accordingly. Mr. Strange submitted it, that this was no Offence indictable; accordingly moved that the Indictment might be quashed. And the Court made a Rule for that Purpose; Judge Lee absent. Vide postea.

Hootle qui tam and Beck.

When Affidavits are intended to be made use of in the Court of King's Bench, in what Office they ought to be filed.

IN the Beginning of this Term Serjeant — obtained a Rule to shew Cause, why Proceedings by Bill upon the Statute of 12 Ann. for Usury should not be said, by Reason that there was no Affidavit filed in the Bill of Middlesex Office, that the Offence arose within a Year, &c. which there ought to be, by the Statute of 21 Jac. 4. A few Days after, Mr. Robinson came to shew Cause, and submitted it, that the Affidavit on which the former Rule was obtained, was not sufficient; because it was only sworn in it, that the Affidavit upon the Statute of 21 Jac. was not filed in the Bill of Middlesex Office. He conceived that that was not the proper Office for filing the Affidavit in; but it ought to be filed in that Office where the Bill is upon the File; for the Act requires that the Affidavit shall be annexed to the Bill upon the File. He said farther, that he submitted it, no Affidavit was necessary; because this is a Prosecution upon a Statute subsequent to that of 21 Jac. and for this Purpose cited the Case of The King and Gall, Salk. 372. Serjeant Wright on the other Side said, that the Statute of Jac. required that this Affidavit should be filed, before any Bill or Information should be made out; and therefore the Affidavit ought to have been filed in the Bill of Middlesex Office. Then in Answer to the Case of The King and Gall he said, that Resolution was to be understood of such subsequent Statute, as allows the Bill

of Information to be in any Court of Record. As to those indeed, he did agree that the Statute of Jac. was repealed pro tanto; and so is the Resolution of all the Judges in the Case of The King and Hicks, which is the very next Case in Salk. to that of The King and Gall. But in the present Statute of 12 Ann. he observed there were no such Words, as allow the Bill of Information to be in any Court of Record; and therefore the Statute of 21 Jac. well extended to the present Case. The Court agreed that if the Affidavit was necessary, the Bill of Middlesex Office was in this Case the right Office to file it in. But Judge Page and Judge Lee were of Opinion that it was not necessary. Judge Probyn of Opinion that it was; accordingly the Rule was then enlarged. Serjeant Wright now moved that it might be made absolute; and said Mr. Robinson had Authority to consent on the other Side, which Mr. Robinson accordingly did; and then the Rule was made absolute. Judge Lee absent.

The King and Kempson.

MR. Abney moved that an Order might be quashed, which was made upon the Defendant to pay a certain Sum weekly to his Son's Wife, by Way of Maintenance, his Son, having run away from her as soon as he married her. The Exceptions that he took to the Order were two; First, that this was an Order of Sessions made upon an Appeal, and the Statute of 43 Eliz. gives them an original Jurisdiction; for this Purpose he cited 2 Salk. 476. The second Exception was, that the Statute only extends to natural Relations; for this Purpose he cited the Case of The King and Monday, Trin. 5 Geo. 1. where an Order upon a Man to relieve his Wife's Mother was quashed; accordingly a Rule was made to shew Cause. Judge Lee absent. Vide postea.

How far that Part of the Statute of 43 Eliz. ch. 2. which directs that Parents shall provide for their Children, shall be construed to extend only to natural Relations, and not to Relations in Law.

Cown and Murrey.

IN Debt on a Bond for Payment of Money in the Month of July, the Defendant pleaded that after the Sealing of the Bond, and before the Exhibiting of the Bill, viz. in the Month of March, he paid the Money, upon which Issue was joined, and a Verdict found for the Plaintiff. Mr. Kettleby moved in Arrest of Judgment, that the Issue was joined up on an immaterial Fact. Serjeant Belfield on the other Side said he believed he must consent to a Repleader. Accordingly Judgment was arrested, unless Cause Co-morrow; and then no Cause was shewn. Judge Lee absent. Vide postea.

When an Action of Debt is brought upon a Bond, what shall be said to be an immaterial Issue, or not, in such Action.

The King *and* Latter.

The Certainty required in a Significavit, in order to Warrant an Excommunication to Capiendo.

IN a Writ of Excommunicato capiendo the Significavit set out, that the Defendant was excommunicated for not appearing to answer Interrogatories to be exhibited against him ex Officio for the Health of his Soul and Reformation of his Manners. Mr. Kettleby moved that this Writ might be quashed; First, because the Defendant's Name had no Addition to it, which the Statute of Eliz. requires. Secondly, because the Offence mentioned in this Significavit, is not one of those mentioned in the Statute. Thirdly, because the Interrogatories were not then exhibited, and perhaps never would. The Chief Justice said he did agree that if this Excommunication had been after Sentence, the Significavit must have set forth particularly the Cause for which he was excommunicated; and therefore where a Significavit has set forth, that the Defendant was excommunicated for not paying Tithes, five alia jura Ecclesiastica, it has been held to be bad. But as this was an Excommunication for the Party's not appearing, he thought it good enough. However a Rule was made to shew Cause. Judge Lee absent. Vide postea.

The King *and* Symphon.

When an Attachment is granted against the Bailiff of a Liberty, for not returning a Writ, upon what Terms the Court will discharge it.

ON Rule to shew Cause why an Attachment should not go against the Defendant, being Bailiff of the Honour of Pomfret, for contemptuously refusing to return a Writ, Mr. Abney said he believed he could not justify the Defendant; and therefore proposed to pay the Plaintiff his Costs. Mr. Strange on the other Side said that he was instructed the Fact was, that by this Neglect in the Bailiff, the Plaintiff has actually lost his Debt; for now the Defendant in the Action is worth nothing; and therefore he desired that it might be referred to the Master to inquire into the Fact; and if the Master should report the Fact to be so, that the Bailiff should pay the Debt as well as the Costs, before the Attachment should be discharged. Judge Page and Judge Probyn said, that they never knew of such a Reference to the Master; accordingly on Payment of Costs only, the Rule was discharged. Judge Lee absent.

The King *against* Holford and others.

When a Mandamus is granted, in order to require certain Persons to deliver over to others certain Books, to whom such Mandamus ought to be directed.

MR. Strange moved that a Writ of Mandamus directed to four Members of the Corporation of Esham, requiring them to deliver certain publick Books to Mr. Bullen, who was of late wrongfully turned out of an Office in that Corporation, might be superseded. The Reason for this Motion was, that it appeared by the Affidavits on which the Rule was obtained, that Yarnel, one of the Persons mentioned in the Rule, and who was Chamberlain in this Corporation, was the only Person that

that had the Possession of them; and likewise that it appeared by these very Affidavits, that Bullen the Person obtaining the Rule, was in Fact out of his Office; and therefore the first Application ought to have been for a Mandamus to restore him. The Chief Justice said, that the first Reason he believed would hardly be thought sufficient; but the second seemed to be a good one; accordingly a Rule was made to shew Cause. Judge Lee absent. Vide postea.

Baynes and Pettifer.

ON Rule to shew Cause, why a Verdict should not be set aside for there being too short Notice of Trial given, and no Defence made, Mr. Pillworth said that the Fact sworn in the Affidavit, on which the Rule was made, was this; that the Defendant lived in Halton, a Hamlet in the Parish of Aylesbury, that Aylesbury was forty-two measured Miles distant from London, and yet that he had but eleven Days Notice of Trial. In Answer, Mr. Pillworth produced the Affidavits of several Persons, that the reputed Distance of Aylesbury from London was but thirty-three Miles, that Walton was of this Side of the Town of Aylesbury; and submitted it, that the Court was to guide themselves by the reputed Distance of Places, and not by the measured one. The Chief Justice said, that where Actions have been brought against the Post-Office, the measured Miles is the Rule to go by; because an Admeasurement of those Roads was made by the Direction of the Act of Parliament; but in the present Case he thought the reputed Distance was the Rule to go by; accordingly the Rule was discharged. Judge Lee absent.

How far the reputed Distance of one Place to another is the proper Rule to go by, and not the measured one.

Smith against Boucher and others.

IN an Action of False Imprisonment, the Defendants justified, that in the Commissary's Court of the University of Oxford there was a Custom, that any Person personally appearing and complaining before the Chancellor, Commissary or Deputy, that he has an Action of personal Damage or Injury within the Precinct of the University against any Member of the University, and making Oath before the Commissary or his Deputy of his said Action and Damage, and that he believes the Party will not appear, but rather run away, the said Chancellor, Commissary or Deputy have usually issued a Warrant for the apprehending and detaining such Party in Custody, till he find Sureties at the next Court in such Sum as the Judge shall think proper. The Defendants farther pleaded, that in the 13th of Elizabeth all Customs belonging to the Courts of the two Universities were confirmed by Parliament. They set forth farther, that on such a Day — Boucher, Doctor of Laws, came before the Chancellor, and complained that he had a personal Action of 1000 l. against the Plaintiff, and that he suspected he would run away; and made Oath of

How far a Person who justifies under Process of an inferior Court, shall be subject, or not, to an Action for doing so.

and upon the Premises in Manner aforesaid. Whereupon a Warrant issued out for the apprehending the Plaintiff, and he was detained three Days thereon for want of Sureties. To this Plea the Plaintiff replied, that before the Issuing such Warrant no Oath was made, that the Cause of Action was true according to the Form of the Statute in that Case made and provided. And to this Replication the Defendants demurred. Serjeant Chappel argued for the Defendants, and submitted it, that the Replication was bad. He did agree, that the Statute of 12 Geo. 1. required, that Oath should be made of the Plaintiff's Cause of Action before the Defendant should be held to Bail. But there are no Words in the Act, which make the Process void, where an Oath is wanting. In Proceedings on the Statute of 5 Geo. 2. 27. the Words of the Act are, That the Process shall be void where it does not pursue the Statute. The same Words are in the Statute of 7 Ann. 12. But there are no such Words in the Statute of 13 Car. 2. Sect. 2. 2. nor in the Statute of 23 H. 6. 10. and on these Statutes the Process was never thought to be void; and particularly upon the Statute of 23 H. 6. it is expressly held so in 1 Cro. 196. Serjeant Hawkins on the other Side said, that he should principally insist, that the Plea was bad; and then whatever became of the Replication would not be material. The Plea he said, was joint between the Judge, Officer, Gaoler and Plaintiff in the Suit below; and therefore if the Plea was bad as to any one of them, it would be bad as to all. The Custom itself as laid, he submitted it, was even bad. It is to hold a Man to Bail till the next Court (when that Court is to be held does not appear); and that even upon the Complaint of an Injury. A Custom that a Capias should issue in a personal Action before a Summons, is held to be void in Roll's Abr. 563. and Mod. 236. and the present Custom is that, and worse. And farther upon this Head he cited Dyer 175. and 3 Cro. 467. If this particular Custom was void, he observed, that a general Confirmation by Statute of the Customs belonging to these Courts would not make it good. For this Purpose he relied upon 2 Inst. 381. Salk. 203. Plow. 399. and Hob. 85, 86 and 87. He insisted farther, that even this Custom, bad as it is, does not appear to have been pursued. It is said, that the Action complained of was a personal Action; but what a personal Action is is a Matter of Law, of which the Court are Judges; for which Reason the Nature of the Action ought to have been set forth, in order that it might have appeared to have been one. The Oath is said too to have been made of and upon the Premises; but those Words are so uncertain, that it is impossible to say from them that the Custom in this Part was pursued. Accordingly for these Reasons he prayed Judgment for the Plaintiff. Serjeant Chappel by way of Reply said, that, as to the Custom itself, he did apprehend it to be good, especially as it is confirmed by Parliament. For this Purpose he mentioned several Customs of the City of London, as variant from the Rules of Law, as the present one; and relied upon 3 Cro. 409. 8 Rep. 121 and 9 Rep. 68. Then as to the Execution of it, he conceived

ceived that the Words of the Plea had followed the Custom; accordingly prayed Judgment for the Defendants. The Chief Justice said, with regard to the Replication, that he thought it clearly bad. For though the Act did extend to this Custom by Reason of the Negative Words in it; yet the Process is not made void thereby; but the Party obtaining such Process without an Affidavit, is subject to an Action upon the Case for so doing. Then as to the Plea, he thought the Custom not bad, especially as it is confirmed by Parliament. And as to the Custom being bad, that a Capias should issue before a Summons, that was to be understood only in Actions of Debt, and such other Actions, and not in Actions of Trespass. The principal Difficulty in the present Case he thought was, whether the Justification under the Custom was bad, or not. And as to that, though the Custom might not appear to be strictly pursued; yet as the Court below had a general Jurisdiction over the Cause, he thought that neither the Judge, Officer, nor even the Party himself could be subject to an Action of False Imprisonment. For this Purpose he relied upon the Case of Pool and Gwynn, Lutw. 935 and 1560. The rest of the Court clearly agreed with the Chief Justice in all the Points, but the Special Justification; and as to that they inclined to be of a contrary Opinion. Accordingly this Matter stood over. Vide postea.

The City of London and Sir Fisher Tensh.

THIS Matter coming on again, Mr. Boote relied now only upon the first of the former Exceptions which he took before; ^{Vide ante} 295. and likewise took a new one, that the City of London have not duly executed the Power, which they have set forth the Act of Parliament gave them. For they have set forth that the Act of Parliament gave them a Power of making Leases for One and Twenty-one Years, that is, Twenty-two Years; whereas the Lease they have declared upon, is for Twenty-one Years only. In answer to the first Exception the common Serjeant submitted it, that the Court would not intend there was an Assignment; and besides it is expressly alledged in the Declaration, that the Defendant hucusque enjoyed the Term, which is an Averment, that he did not assign it. In answer to the second he submitted it, that a Power to make Leases for Twenty-two Years included in it a Power to make Leases for Twenty-one. Accordingly the Court gave Judgment for the Plaintiffs.

Cowper and Alton.

Construction upon the Statute of 5 Geo. 2. which requires that Law Proceedings shall be in English.

THIS was a Question, that arose upon the Statute of 5 Geo. 2. which requires the Proceedings of all Actions to be in English, where the Cause of Action is under 10l. The Action here was Trespass; the Damages laid in the Declaration were 40l. the Damages found by the Jury were only 1 s. and the Proceedings were in Latin. The Motion came on in Arrest of Judgment. The Chief Justice was of Opinion, that the Words Cause of Action were not to be understood the Damages found by the Jury; because those same Words in another Clause of the Act, which relates to the Plaintiff's holding the Defendant to Bail, cannot receive that Meaning. The Rest of the Court were all of the other Opinion. Accordingly they said they would consider of this Case amongst themselves, and then deliver their Opinion. Vide postea.

Anonymus.

How far a Mandamus will lie to the Ecclesiastical Court, in order to require them to grant Administration.

MR. Strange moved for a Mandamus to be directed to a Judge of the Ecclesiastical Court, requiring him to grant Administration to the Residuary Legatee, the Executors having renounced. The Will he said was of one M^r. Kynaston, who left behind him two Sons; one of which he made his Residuary Legatee, and the Judge of the Ecclesiastical Court has refused granting him Administration, till he has had a Return made to a Commission of Appraisement, which he has issued forth. In the Case of Lord Londonderry's Will, the Ecclesiastical Court refused to grant Probate, till such Commission returned. The Court there held such Commission to be illegal, and granted the Mandamus, without making a Rule to shew Cause. He remembered, he said, lately before the Delegates the Civilians of all Hands agreed, that the Course of their Courts is constantly to grant Administration to the Residuary Legatee, where the Executors renounce. Accordingly submitted it, that the Mandamus was equally reasonable in the present Case. But the Court thought the present Case much differed from the Case cited. In the Case cited the Party had a Right by the common Law to have the Probate granted; and therefore it was proper for the Court to grant a Mandamus, that the Right of the common Law might be executed. But in the present Case at most the Party has a Right to Administration only by the Rules of the Ecclesiastical Court; and therefore it was not proper, that this Court should interfere by granting a Mandamus. However a Rule was made to shew Cause. Vide postea.

Thomas and Bishop.

THIS Matter coming on again, Mr. Kettleby insisted, that ^{Vide ante} there were some other Circumstances appearing at the ^{320.} Trial, which made the Case more clear in Favour of the Defendant. The Person, that drew the Bill, was Mr. Charles Mildmay, who was employed by the Company to act as Servant for them at Fronsben in Scotland. At this Place the Bill was drawn; and from this Place the Letter of Advice was dated, which was directed to the Governour and Court of Assistants of the York-Buildings Company at their House in Winchester-street, London. In Pursuance of this Letter the Governour and Court of Assistants met and made an Order upon the Defendant to accept the Bill; which Fact the Defendant was prepared at the Trial to prove, but the Judge refused to admit Evidence of it. Upon these Circumstances Mr. Kettleby submitted it, that the Plaintiff had a good Remedy against the Company, that he had no Remedy against the Servant; and therefore for the Misdirection of the Judge, he hoped a new Trial should be granted. The Court said, this was not a Bill drawn upon the Company, but a Bill drawn upon the Defendant. The Direction of the Bill to Humphrey Bishop, Cashire of the Company, &c. was only a Description of his Person for the better finding of him, and what Account he was to place the Money to, when he had paid it, they thought was not material. They said they thought no Evidence ought to be admitted in these Cases, that is extrinsic of the Bill, where Actions are brought by Indorsees, as the present one was. Accordingly the Rule was discharged.

Cown and Murrey.

Serjeant Belfield came now and informed the Court that by ^{Vide ante} Consent this Matter was not moved again the next Day ^{329.} as by the Rule of the Court it was ordered. And therefore now he begg'd Leave to lay before the Court his Reason, why the Plea was good. He did agree, that by the viz. the Time of Payment was tied up to the 26th of March; but as the Defendant had alledged before the viz. that after the Sealing of the Bond, and before the Exhibiting the Bill he paid the Money, the Defendant might give in Evidence Payment on any Day before the Exhibiting the Bill; and therefore the viz. should be rejected. The Court were of the same Opinion; accordingly Judgment was given for the Plaintiff.

Shake-

Shakespear, on the Demise of Mills, *against* Hymer and others.

How far the Court will not put off the Trial in an Ejectment, notwithstanding the Party wants the Inspection of Deeds which are in the Custody of another.

IN Ejectment the Defendants moved that the Trial might be put off till the Sittings after Term, upon Affidavits that the Plaintiff's Attorney was in Possession of certain Deeds, material for the Defendants to produce in Evidence, and had refused to deliver them. The Chief Justice said, that though the Lessee of the Plaintiff himself had been in Possession of those Deeds, that would have been no Reason for putting off the Trial in Ejectment; accordingly the Motion was refused.

Donalt and Lowther.

How far the Tithe of a Corn-Mill shall be said to be predial Tithes, or not.

THE Defendant had libelled in the Spiritual Court for the Tithe of a Corn-Mill as predial Tithe. The Plaintiff set forth in his Answer, that he conceived the Tithe of a Corn-Mill to be a personal Tithe; and therefore prayed to be allowed all his necessary Charges in attending the Mill, before the Tithe should be paid. The Judge over-ruled this Plea, and decreed that the Plaintiff should pay these Tithes without any such Deduction. Upon which Mr. Dennison moved for a Prohibition, and cited the Case of Chamberlain and Clifton, determined in the House of Lords the 20th of June 1706, wherein it was resolved, that the Tithe of a Corn-Mill was personal Tithe; accordingly a Rule was made to shew Cause.

Holloway and King.

Construction upon the Statute of 5 G. 2. which requires that Law Proceedings shall be in English.

IN a Suit by Bill against an Attorney, Mr. Agar had obtained a Rule for referring the Irregularity of the Proceedings to the Master; who accordingly reported the Fact to be in this Manner, That the Damages laid in the Declaration were 20 l. Judgment by Nil dicat, that on the Writ of Inquiry the Jury had found but 6 l. Damages and that all the Proceedings were in Latin. Mr. Strange now moved for Judgment upon the Master's Report. The Question he said arises upon an Act of 5 Geo. 2. The Act recites the Inconvenience of Persons being arrested, and detained in Custody for frivolous Demands; and therefore provides, that in all Matters under 10 Pounds the Defendants shall be served with a Copy of the Process, and the Proceedings shall be in English. He submitted it, that this Act was to be understood only of such Actions, where the Defendant used to be served with a Process to take his Body; and therefore provides that in small Demands the Defendant shall not be arrested by such Process, but served with a Copy of it only. In Suits by Bill against an Attorney, the Defendant is always supposed to be present in Court; and therefore he conceived, that the Act did not extend to the present Case. The

Court

Court was of another Opinion, however said that this Matter would still depend upon the Question which the Court has reserved, whether the Damages in the Declaration was to be considered the Cause of Action, or the Damages found by the Jury; accordingly this Matter stood over. *Vide postea.*

Griffith and Allcock.

SINCE the Time that this Case was last argued, the Chief Justice said that he had looked upon the Statute of 5 G. 2. ^{*Vide antea*} 327. which explains and amends the Statute of 12 Geo. 1. and he found there was a Proviso in it, which enacts, that in particular Franchises and Jurisdictions the proper Officer there shall execute such Process, and he doubted whether that Proviso did not extend to the present Case; upon which this Matter came now to be argued again. Serjeant Birch said that Chester is always considered as a Franchise; and therefore was within the very Words of the Proviso, but submitted it farther, that this Case was within the 12th of Geo. 1. which he relied upon before; and for this Purpose cited the Case of Peek and Smith in the Common Pleas, Mich. 1 Geo. 2. The Defendant there lived within the County Palatine of Durham, and the Question was, whether the Defendant should be served with a Copy of the Process issuing out of this Court, or a Copy of the Mandate under the Seal of the Bishop of Durham. The Court of Common Pleas was of Opinion that the Defendant ought to be served with a Copy of the Mandate under the Seal of the Bishop of Durham. The Court said that notwithstanding the Case that has been cited, they must continue of the Opinion that they were of before, upon the first Act of Parliament; and Judge Lee who was now in Court, said he intirely concurred in that Opinion. They inclined to be of Opinion too, that Counties Palatine were not within the Words particular Franchises and Jurisdictions; for they are considered as superior Courts. However said that they would consider of this Case a little farther.

Amcock and Ennover.

THIS Matter coming on in the Paper again, Serjeant Eyres ^{*Vide antea*} appeared for the Plaintiff; and no Body being on the ^{308.} other Side, Judgment was given for him unless Cause on Saturday.

Osborn and Oyle.

THIS Matter now coming on again, Mr. Fazakerly said that ^{*Vide antea*} he could say nothing new upon this Subject, unless it was ^{268.} that he submitted it, the Statute for the Amendment of the Law cured this Defect, if it was any, the Judgment being by Nil dicit. The Court thought that such Defect could not be cured; because a former Act had required that all Proceedings should

should be in Latin. However this Matter stood over for the Opinion of the Court upon the general Consideration of the Statute of 5 Geo. 2. Vide postea.

Stephens and Lofty.

Construction upon the Statute of 2 Geo. 2. which allows one Debt to be set off against another.

UPON a Writ of Error on a Judgment in the Common Pleas in Debt on Bond, M^r. Draper said that the Penalty of the Bond which the Plaintiff had declared for, was 76 l. 10 s. Upon Oyer, the Condition appeared to be for Payment of 38 l. 5 s. and then the Defendant pleaded that on the 1st of April 1732, which was after the Day mentioned in the Condition of the Bond, the Plaintiff was indebted to him in the Sum of 70 l. for Money had and received to his Use. To this Plea there was a Demurrer. M^r. Draper said that the Question arises upon an Act of Parliament made 2 Geo. 2. for setting one Debt against another. It was objected by the Plaintiff's Counsel in the Court below, that this Plea was bad in two Respects; First, that the Penalty of the Bond was the Debt, and that being 76 l. 10 s. the Sum of 70 l. could not be pleaded against it. Secondly, that the Debt by simple Contract cannot be set against a Debt by Bond, the Debt by Bond being a Debt of a higher Nature. And accordingly in the Court below the Plaintiff has had Judgment. In Answer to these Objections M^r. Draper submitted it, that where Debts are set one against another, by Virtue of this Act of Parliament, the Courts of Common Law are in those Cases to consider Debts in the same Light that the Court of Equity do; and if so, he submitted it, that both these Objections would be answered. He said farther, that even supposing the Penalty should be considered the Debt, yet under this Act of Parliament the setting another Debt against it must be considered as Payment; and if so, the Plea of Payment of a less Sum than the Penalty, and greater than the Sum in the Condition will be good by the Statute for the Amendment of the Law. To the second Objection the Court were something divided in Opinion. The Chief Justice and Judge Probyn thought that a Debt by simple Contract might be set against a Debt by Bond. Judge Page of the contrary Opinion. And Judge Lee gave no Opinion to this Point at all. But as to the other Objection the Court clearly agreed that it was fatal; accordingly affirmed the Judgment.

The King and Lloyd.

J. C.
Vide antea
301. 310.

MR. Fazakerly now rested again upon the Exception he before took, that the Evidence ought to have been set out. He farther said, that the Misdemeanors, of which the Defendant is convicted, are Extortion in his Office as Clerk of the Peace at the Sessions for the County of Anglesey; but the Sessions is not sufficiently described. For it is only said that the Defendant committed these Offences at a Sessions held before his Majesty's

jesty's Justices of Peace, Quorum unus, without mentioning who they were, or describing their Authority. Mr. Draper argued on the other Side, and said, that in Convidions before two private Justices, the Depositions are always taken in Writing; and therefore he did agree that in those Cases the Evidence must be set forth in the Convidion. But at a Sessions the Testimony of the Witnesses is not taken down in Writing; and therefore in the present Case he submitted it, that it was unnecessary. In the Case of The Queen and Horrel, Mich. 11 Ann. and in the Case of The King and Harland, which were Convidions at the Sessions, the Evidence was not set out, and yet no Exception taken on that Account. To the second Objection he submitted it, that as this was only a Description of an Act done at another Sessions, the Names of the Justices were not necessary to be set out. The Chief Justice said with Regard to the second Objection, that if the Names of the Justices had not been inserted in the Style of the Convidion itself, he should have thought the Objection would have prevailed; and he has known both Indictments and Orders of Removal quashed upon such Objection. But as the present Convidion is, he thought the Objection was answered. As to the other, he was of Opinion that it was a fatal Objection; many Convidions before private Justices undoubtedly have been quashed on this Account, particularly in the Cases of The Queen and Brown, The Queen and Guerey, and The Queen and Randes, Pasch. 13 Ann. And he could not see any reasonable Distinction between those Convidions and the present one. Judge Lee said that he doubted whether this was a Convidion in the present Case, or only an Order. Those of Bostarday are considered only as Orders; and yet the Party is subject there to be sent to the House of Correction. But supposing it to be a Convidion, yet still he doubted whether the Evidence was necessary to be set out; and particularly he mentioned the Case of The Queen and Baynes, which he said bore a good deal of Argument, and deserved to be looked into; accordingly this Matter stood over. Vide postea. *Abb.*

Whitewood qui tam and Jokam.

THIS Matter coming on again, Mr. Lacey relied upon the *Vide antea* Answers he had given before, and farther submitted it, that ³²³ supposing an Information qui tam might be quashed, and supposing the Affidavit was not good for the Exception that had been taken to it; yet still he observed that this was no Fault appearing upon the Face of the Information. An Information cannot be quashed but for such Faults; and therefore at all Events the present Rule must be discharged. The Chief Justice said, in the Case of The City of London, where a Motion was made to supersede a Writ of Mandamus, Lord Macclesfield and the present Chief Justice of the Common Pleas laid it down for clear Law, that a Writ could not be quashed, but for such Errors; accordingly the Rule was discharged.

Dr.

Dr. Wilmot *and* The Bishop of Lincoln.

Vide antea

IN the Declaration that was drawn in Prohibition, the Members of King's College, that were cited before the Commissioners, were not made Parties; upon which Mr. Strange obtained a Rule a few Days ago to shew Cause, why these Members of the College should not be added Defendants with the Bishop. Mr. Graves came now to shew Cause upon the Rule. But the Court thought proper to make it absolute. And the Chief Justice said that this Method of declaring in Prohibition is allowed, not only to bring the Judge, but the Party before the Court.

Anonymus.

When a Rule is made to shew Cause why an Information in the Nature of a Quo Warranto should not be granted, and that Rule is moved to be enlarged, upon what Terms the Court will enlarge it.

MR. Strange moved to enlarge a Rule made upon the Mayor of Weeram to shew Cause, why an Information should not go against him for a Misdemeanor. He desired only to enlarge it till the latter End of this Term; and in Case the Rule should be made absolute, he should consent to appear, as if the Rule was made absolute. Where indeed a Motion is made to enlarge a Rule of this Sort till next Term, he did agree the Party must consent to plead as well as to appear within the same Time as he would be obliged to do, if the Rule was made absolute directly. Mr. Masterman informed the Court that the Præise was so; accordingly upon these Terms the Rule was enlarged.

Anonymus.

When there are Rasures in Records, how far the Court will make a Rule that the Records themselves shall be produced.

MR. Abney moved for a Rule upon Mr. Blandey, the Steward of a Court-Leet, called Osborn Court, to attend with the Records of the Court at a Trial, where those Records would be wanted, upon an Affidavit, that there were some material Rasures made in the Records. He said the same Motion was granted in the Case of Nichols and Philips upon the like Affidavit; accordingly the Court made such Rule in the present Case.

Anonymus.

When a Person is found by the Coroner's Inquest to be guilty of Manslaughter, how far the Court will not allow him to be bailed.

MR. Parker moved that Russey Carter might be bailed, who was found by the Coroner's Inquest to be guilty of the Manslaughter of Wotton; he said he moved this upon the Foundation not only of the Coroner's Inquest, which had found the Fact against the present Defendant very uncertainly; but upon the Depositions which were taken at the Time the Coroner's Inquest was found, and likewise upon Affidavits of Circumstances very favourable on the Part of the Defendant.

He cited too Latch 12. and Salk. 104. where the Depositions of the like Nature were read. Upon hearing the Inquest read, the Court said that they thought the Facts specially stated amounted to Murder. And though the Inquest have found the Defendant only guilty of Manslaughter, the Consequence of which is, that if the Defendant was tried upon this Inquest, he could be found guilty of nothing more; yet they thought upon this Inquest an Indictment of Murder might well be found, and possibly the Defendant convicted upon it. Upon hearing the Depositions, they said the Fact appeared to be Murder upon them likewise. And they would not allow any Affidavits to be read, which were not Part of the Depositions; accordingly the Motion was refused.

Foster and Grayham.

UPON a Writ of Error on a Judgment in the King's Bench in Ireland in Ejectment for Lands in the County of Meith, a special Verdict appeared to have been found in the Manner following. James Earl of Anglesey, being seised of the Lands in Question, and of divers other Lands in the Kingdom of Ireland, of an Estate in Fee-simple, on the 13th of May 1701, made his Will in Writing, and thereby devised all his said Lands to certain Trustees and their Heirs, for Payment of his Debts and Legacies, the Remainder to his Brother Arthur Anesley for Life, and afterwards to his first and other Sons in Tail Male, and in Default of such Issue, to his Daughters and the Heirs of their Bodies, Share and Share alike, respectively; the Remainder to Richard Lord Altham for Life, and afterwards to the Issue Male of his Body, and in Default of such Issue, to his Issue Female, in like Manner as aforesaid; the Remainder to his Uncle Charles Lord Anglesey for Life, and afterwards to his Issue, in like Manner as aforesaid; the Remainder to his own right Heirs. He then gave the respective Persons, to whom he had devised his Estate, a Power of making Leases of thirty-one Years, reserving the best Rent that could be got for them. Richard Lord Altham died; and afterwards on the 1st of June 1731 the Devisor added a Codicil to his Will in the Manner following; He thereby devised all his Lands in England and Wales to Arthur Lord Altham, eldest Son of Richard Lord Altham deceased, for Life, and afterwards to his Issue in like Manner as aforesaid; the Remainder to his Brother Arthur Anesley for Life, and afterwards to his Issue as aforesaid; the Remainder to his Uncle Charles Lord Anglesey as aforesaid; the Remainder to his own right Heirs; and then came the following Clause. Item, I devise all my Manors, Lands, Tenements and Hereditaments in the County of Meith and in the Town of Nurofs in the County of Wakesford to Arthur Lord Altham for Life, and afterwards to his Issue, as aforesaid; the Remainder to Arthur Anesley, as aforesaid; the Remainder to Charles Lord Anesley, as aforesaid; the Remainder to go, to the same Persons; and with and under the same Powers as my said other Estates, devised to them as aforesaid, are appointed to go. And then he declared his Meaning to be, that these Estates in the County of Meith and

How far a
Codicil shall
be said to ex-
plain a Will.

pose was the Case of Andrews and Sir Matthew Decker, Easter 3 Geo. 2. in the Common Pleas at the Sittings before the Chief Justice. That was an Action of False Return brought against the Sheriff for returning Nulla bona upon a Writ of Execution. On Evidence the Defendant justified his Return by Reason that the Party, against whom the Writ issued, was become a Bankrupt, and a Commission taken out against him at the Time of the Delivery of the Writ to him to be executed. Yet no Pretence was there, that an Assignment of the Goods was made, till sometime after the Return. Notwithstanding this the Chief Justice of the Common Pleas allowed the Return to be good. He said there would be no Occasion to consider how this would be in the Case of an Extent. In the present Case there was no Extent; but the Goods were seized by a Warrant from the Commissioners of the Land-Tax under the Act of Parliament. Serjeant Eyre argued on the other Side, and cited 3 Keb. 14. Sir William Jones 202, 203. 1 Cro. 189. 3 Lev. 191. and the Statute of 21 Jac. 19. (10.) The Chief Justice said, that he did agree an Assignment from the Commissioners has to many Respects a Relation to the Time when the Act of Bankruptcy was committed. And therefore if after such Act the Bankrupt disposes of his Effects, the Assignment shall certainly over-reach it. He agreed the same too, where a Sheriff takes Goods in Execution of a Bankrupt, and does not deliver them over to the Party, before the Assignment made. But where the Sheriff does deliver them to the Party before the Assignment made, the Assignment shall not have a Relation to defeat that Execution: because there the Execution was completed. He said he could not agree, that the Bankrupt ceased to have the Property of his Goods at the Time of the Act of Bankruptcy committed. The Property does continue in him even till the Assignment. The Property is never in the Commissioners; they have only a Power given them of assigning the Effects from the Bankrupt. If this had been an Extent of the Crown in the present Case, undoubtedly the Goods of the Bankrupt would have been bound from the Day the Extent bore Date; and no Assignment could have over-reached it. For the Statute of 29 Car. 2. does not extend to Extents of the Crown. He said, he thought the present Case did not differ from that. The Land-Tax is Money belonging to the Crown, though appropriated to particular Purposes. And the Parliament giving the King a more speedy Remedy, than an Extent, cannot be supposed to have put the King in a worse Condition, than if an Extent had issued. As to the Opinion, that was cited of Lord Chief Justice Eyres, he owned he could not agree with it. And Judge Lee said the Case in Salk. 111. is against it. However this Matter stood over. Vide postea. 3 J. 2.

Astley and Brandwood.

Vide ante
168.

THIS Matter coming on again, Mr. Bootle the Elder argued in Support of the Plea, and cited Bro. Abr. Tit. — Pla. 59. 1 Inst. 303. 3 Lev. 219. Hob. 51. Dyer 349, and Yelv. 27. The Chief Justice said, that this was a Plea of a Collateral Warranty in Bar of the Demandant's Title; and therefore ought to be pleaded as strictly, as if it was the Plea of an Estoppel. He said he did agree, if a Stranger had disseised Alexander, the collateral Warranty would have barred the Demandant's Title. But some Sort of Seisin was necessary in order to make the Feeffment with Warranty of any Effect. But he did not think such Seisin was sufficiently averred in the Plea; accordingly inclined to be of Opinion with the Demandant. However this Matter stood over. Vide postea.

Strawn and Fletter.

How far a
Remittitur
of Damages
is necessary
to be enter-
ed.

MR. Abney moved that a Writ of Inquiry might be set aside, on Account of the Damages given by the Jury being 100 l. whereas the Damages laid in the Declaration were but 20 l. The Chief Justice said, that a Remittitur entered by the Plaintiff might cure this Defect. However he pronounced a Rule, that the Plaintiff should bring in the Writ of Inquiry, that the Defendant might move in Arrest of Judgment on this Exception. For he said, unless the Plaintiff does enter such Remittitur, the Judgment would be erroneous. Vide postea.

Chapman and Brown.

How far the
Court will
stay the Pro-
ceedings, or
not, on a
second No-
tice of Trial
till the Costs
of a former
are paid.

THE Plaintiff as soon as he had brought his Action against the Defendant, which was Assault and Battery, went a Voyage to the Indies; but left Instructions with his Son and with his Attorney, that if the Defendant would pay the Costs, they should proceed no farther. The Defendant had offered to pay the Costs. Notwithstanding this the Plaintiff's Attorney gave Notice of Trial; but yet did not bring the Trial on. Lately he had given fresh Notice of Trial. Mr. Strange said, that the Defendant in this Case cannot have the Benefit of the usual Remedy of an Attachment for Non-payment of Costs; because the Plaintiff is out of the Kingdom. For which Reason he moved, that Proceedings upon this second Notice might be staid till Costs of the former paid. He said, in an Information qui tam he moved that the Prosecutor might give a Note of his Place of Abode. It came out, that the Prosecutor was gone beyond Sea. Upon this the Court staid Proceedings there; because otherwise the Defendant would have had no Remedy for his Costs. Which he submitted it was a Case of the same Nature with the present one. The

Court inclined to think that they never grant these Motions but in Ejectment. Upon which he moved that the Attorney might shew Cause, why he proceeded in this Cause against the Plaintiff's Directions. The Court said they never knew such Motion granted. However they gave him Liberty to move this Matter again, if he could find any Case to warrant it. The next Day he mentioned the Case of Nokes and Watts, Pasch. 7 Geo. 1. The Plaintiff there was a Pauper. And for that Reason Proceedings on the second Notice were staid till the Costs of a former paid. Judge Probyn said, that in such Case of a Pauper, he remembered another Answer had been given to such Motion, which is that he may be dispaupered. And Mr. Strange owned there was a Case to that Purpose in Salk. 506. Judge Lee said too, that Pasch. 5 Geo. 2. on Mr. Harvey's Motion, the Court said they never grant these Motions but in Ejectment. Mr. Gapper said too, that the Case of Nokes and Watts was upon his Motion, and that was an Ejectment. However the Chief Justice made a Rule to shew Cause. But afterwards it was discharged by Consent.

The King *and* Tallard.

MR. Filmer came now to shew Cause, and said, that this Court ^{Vide antea} is the Custos Morum of all the King's Subjects. And for ^{318.} this Reason it is, that the Printers of obscene Books have been punished by Indictment and Information. The Printer of Lord Rochester's Poems was indicted for doing so. And Mr. Curl had an Information granted against him upon the like Occasion. To the like Purpose he cited Sid. 168, and Keb. 491. Mr. Strange argued on the other Side, and said, that a Man's being strip'd from the Middle upwards could be no indecent Sight. If it was so, the Legislature would not have ordered, that Men shall be whipp'd in that Manner; as they have done by several Acts of Parliament. The Court was of the same Opinion. Accordingly the Rule was made absolute.

The King *and* Hurst.

MR. Fazakerly came to shew Cause, and said that he did a. ^{Vide antea} agree it was sworn in the Affidavit, on which the Rule was made, that the Defendant was an Attorney of the Court of Common Pleas. But that Fact ought to have been verified by a Certificate from the Records of the Court. For which Reason he submitted it, that an Affidavit was not sufficient. But the Court was of Opinion, that the acting as Attorney and Under-Sheriff at the same Time was an Offence within the Statute of H. 5. though perhaps the Defendant was not regularly sworn an Attorney. Accordingly the Rule was made absolute.

The King and Dr. Earbury.

Vide ante
293.

MR. Jossling moved, that a certain Recognizance, by which the Defendant was bound to appear in this Court, might be taken off the File; that so much of a Rule of this Court, as related to the Defendant's appearing to this Recognizance, might be discharged; that the Defendant's Papers, seized by Virtue of a Warrant from one of the Secretaries of State might be restored to him; and that a Satisfaction might be awarded to him for the Imprisonment he suffered under this Warrant. He took Notice that some Time before the Beginning of last Michaelmas Term, a Warrant was issued forth in the Name of the Duke of Newcastle, one of the Secretaries of State, which was directed to two of the King's Messengers, requiring them, taking a Constable to their Assistance, to make diligent Search in the House of the Defendant, the Author of a treasonable Paper, intituled The Royal Oak Journal, for all Papers of what Kind soever, in his Custody, and to bring the said Defendant with the said Papers before him. The Messengers, without taking a Constable to their Assistance, entered into the Defendant's House, seized his Papers, and brought them, together with the Defendant, before M^r. De la Faye, who was the Duke of Newcastle's Secretary, and a Justice of Peace. No one was examined by M^r. De la Faye, to prove the Defendant to be the Author of this Paper; nor did the Defendant confess it. However, M^r. De la Faye told the Defendant he must commit him, if he did not enter into a Recognizance in the Sum of 100 Pounds, with two sufficient Bail, conditioned for his Appearance in the Court of King's Bench the first Day of last Michaelmas Term, and not depart the Court without License. To avoid being committed, the Defendant with two sufficient Bail entered into such Recognizance; and the Recognizance was signed Ch. De la Faye. The Defendant appeared in the Court of King's Bench on the first and last Day of last Michaelmas Term, and on the first and last Day of the three following Terms; but on the last Day of Trinity Term last, as soon as he had moved to have his Appearance recorded, he prayed to be discharged. Upon this the Attorney General exhibited two Informations against him in open Court, and moved that he might be charged with them. M^r. Masterman accordingly demanded of the Defendant, whether he appeared to them. The Defendant did not by any open Act either assent or dissent to the Question demanded of him; but insisted, that the Recognizance by which he was bound over to this Court, was illegal, and that he ought to be discharged from it. The Court told him that they could not discharge his Recognizance. Upon that he went out of Court, and the Officer recorded his Appearance to the Informations. This, M^r. Jossling said, was the State of the Fact; and upon this State of it he apprehended that his Motion was regular. He said he would not contend but it has been resolved, that a Secretary of State's Warrant to seize a Person suspected of treasonable Practices, was legal. But this Resolution was but a

late one, founded only upon Precedents, and not one antient Resolution in the Books to justify it. However it never was yet resolved, that a Secretary of State could grant a Warrant to seize a Person's Papers, and it manifestly is against the Rights and Liberties of the Subject. As the Warrant itself was illegal, so was the Execution of it likewise. For it was done without the Assistance of a Constable, and the Defendant not brought before the Secretary of State himself, as the Warrant directed, but a Secretary under him. He then objected to the Recognizance; he said he should not contend but there were Precedents to justify a Justice of Peace in binding a Man over to this Court; but there was not one Resolution in the Books antient or modern, to justify such a Practice. A Justice of Peace has a Jurisdiction which is confined within the Bounds of his County. And it would be a Matter very inconvenient to the Subject, if it should once be settled for Law, that a Justice of Peace in Cumberland might bind a Man over to this Court sitting at Westminster. The Manner of taking the present Recognizance was illegal too, in as much as there was the Oath of no one, nor the Confession of the Party, at the Time it was required of him. The Form of it is likewise bad; for the Defendant is bound over to appear at the Court of King's Bench at Westminster; whereas the Style of this Court is *coram Rege ubique*; it is not inserted in the Recognizance for what Cause he is to appear; the Recognizance is signed too, Ch. De la Faye; so that the Christian Name of De la Faye is imperfectly set out; and it no where appears in the Recognizance, that he was a Justice of Peace. Mr. Jolling then spoke to the Appearance of the Defendant; and submitted it in the first Place, that the Defendant in fact did not appear to these Informations; and in the next Place, that he legally could not. He did agree that when the Question was asked the Defendant, whether he appeared, he did not in Words directly refuse it; but he contended that the Recognizance by which he was brought into Court was illegal; which was the same Thing as if he had in Words directly contended that he was not obliged to appear. He submitted it therefore, that when the Officer of the Court demands of the Party whether he appears, the Party insists that he is not bound to appear; the Court tells him that he is bound to appear, and if he does not his Recognizance will be forfeited; the Party upon that goes out of Court, that may as well be construed a Departure without License, as an Appearance; for which Reason with Regard to the Fact he submitted it, the Officer did wrong in recording that the Defendant did appear to these Informations. But supposing the Fact to be that he did submit to appear; yet as the Recognizance, which is in the Nature of a Process, to bring the Party in to appear, was illegal, for the Reasons he had before given, he conceived that the Appearance could not be legal neither; and for Authorities to support the several Parts of his Argument he cited Godb. 118, 147. 39 H. 6. 27. Archbishop of Canterbury's Case, 4 Jac. 2. Sid. 32. Lut. 951. 11 H. 4. 7. Lamb. 89. Cr. 3. 646. The Chief Justice said that in the Case of Kendal and Roo, it was settled upon solemn Debate, that a Secretary of

of State might issue out his Warrant to apprehend the Person of any Man on Suspicion of treasonable Practices; and therefore did not think that that Part of the present Warrant would have been disputed at this Day. As to the other Part of it, with Regard to seizing the Defendant's Papers, he would not give an Opinion, whether it was legal, or not. This Court could not make a Rule upon the Messenger, that did seize them, to restore them; and therefore that Question was not properly before the Court for their Determination. There was no Occasion to determine neither, whether in general Justices of Peace have Authority to bind over to this Court. The Person that did this in the present Case, was a Justice of Peace for the County of Middlesex, and undoubtedly he might bind over to this Court; this Court having a Jurisdiction of Oyer and Terminer for that County. However he had before him several Precedents of Justices of Peace of other Counties binding over to this Court likewise. He had likewise before him several Precedents of Recognizances taken by Judges of this Court and Justices of Peace, wherein the Stile of their Authority was not inserted. He had seen several too, which are only in this general Form *ad Respondendum*, &c. And as to the other Exceptions, with Regard to the Form of this Recognizance, if there was any Weight in them, the Defendant might have taken Advantage of them, if a *Scire facias* had been brought upon it. But what the Defendant has done, has in Judgment of Law amounted to an Appearance; and as that is so, all Defects in the Recognizance are thereby cured; for this Purpose the Chief Justice mentioned the Case of *Widrington and Charlton*, Trin. 11 Ann. that was an Appeal of Murder. The Defendant did not appear till the Exigent; and when he did appear, his Appearance was entered in the most cautious Manner that could be, for it was in these Words, *Et prædictus Defendens, salvis sibi omnibus Advantagiis & Exceptionibus tam ad breve Originale quam ad Processum, venit*; and thereupon for Faults in the Exigent demurred. Lord Macclesfield, Mr. Justice Eyres, and Mr. Justice Powis held, that all Defects in Process were cured by the Party's Appearance. Mr. Justice Powel indeed was of another Opinion, as this was a Writ of Appeal; but agreed such Defect would have been cured by Appearance in every other Action. The rest of the Court agreed with the Chief Justice in the present Case; accordingly the Motion was disallowed of.

Anonymus.

Vide antea

DR. Straughan coming now to New Course, he said that the granting Commissions of Appraisement in these Cases is according to the constant Course of the Ecclesiastical Court; but as soon as the Commission was returned, Administration with the Will annexed would undoubtedly be granted. The Commission in the present Case was a Commission of Inspection as well as Appraisement, in order that the Papers of the Deceased may be look'd into, and likewise that the Personal Estate

Estate may be apprais'd and inventory'd. The Justice said, in these Cases of Administration the Court would not interfere by granting a Mandamus; but where the Party applying for Administration is intitled to it by some Act of Parliament; or where the Ecclesiastical Judge is unreasonably dilatory in his Proceedings. He did not think that this was any ways the present Case; accordingly the Rule was discharged.

The King and Harper.

THE Defendant having been brought up by Habeas Corpus, the Substance of the Commitment appeared to be in the Manner following; To the Keeper of the House of Correction for the City and Liberty of *Westminster*. Whereas *John Harper* has been brought before me, one of his Majesty's Justices of the Peace for the County of *Middlesex* and City and Liberty of *Westminster*, and Oath has been made by two credible Witnesses that the said *John Harper* is a common Player of Interludes, without the King's Licence, in the Parish of *St. Martin in the Fields* in the County of *Middlesex* and City and Liberty of *Westminster*. And whereas it appears to me upon Examination of the said *John Harper* upon Oath, that the said *John Harper* has not any visible Way of Livelyhood, but is a common Player of Interludes. I do hereby adjudge the said *John Harper* to be a Rogue and a Vagabond, in Pursuance of the Statute in that Case made and provided. These are therefore in his Majesty's Name to require you to take into your Custody the Body of the said *John Harper*, and to keep him to hard Labour till the first Day of the Sessions to be next holden for the City and Liberty of *Westminster*. Thomas Clarges. M^r. Abney and several others were Counsel for the Defendant, and upon this Return they moved that he might be discharged; they submitted it, that the Warrant on which the Defendant was committed, was a Conviction; by Reason of those Words in it, I do adjudge. And if so, it was clearly bad for want of the Evidence being set out in it. But if it should not be considered as a Conviction; at least it was a Commitment in Execution. And upon such Commitment the Defendant is not bailable; for which Reason there ought to be as much Certainty in it, as in a Conviction. But supposing it to be only a bare Commitment; yet there were such Exceptions to the Form of it, as that the Defendant ought to be discharged. The Statute upon which it is founded, is 12 Ann. 2. 23. And by that Statute such Justice only as lives near the Place where the Fact is committed, has a Jurisdiction over the Cause; but nothing of this is set forth in the present Commitment. The second Section of this Statute requires too, that the Complaint should be made by a Constable, or other Inhabitant; but in the Commitment it is no where set out on whose Complaint it was founded. It is not set out neither, before whom the Oath was taken, which the two Witnesses made. The Time when the Fact was done is not specified; and it does not appear, that that Part of the Parish of *St. Martin in the Fields*, in which the Fact was done, was within the City or Liberty of *Westminster*. The Time too, for which the Defendant is committed,

What shall be said to be a good Commitment, or not, of a Person who acts Stage-Plays without a Licence.

is likewise uncertain; for Non constat when the Sessions for the City and Liberty will be held; whereas the Sessions for the County at large is settled by Act of Parliament. The Defendant's Counsel then excepted even to the Substance of the Commitment, and submitted it, that he was not within the Words of Intention of the Act, by Reason that it was not pretended he was a Vagrant. And it appears by the whole Comprehension of this Act, that Vagrancy is necessary to make the Persons specified in the Act, Offenders within it. They conceived likewise, that Stage-Players and Comedians do not fall within the Description of any of the Persons specified in the Act. And it was well known, that the Defendant was a Stage-Player and Comedian, and one that acted too with great Reputation. They submitted it, that such Persons could by no Means be comprized under those Words in the Act, Common Players of Interludes. They could by no Means be understood by the Act to be declared Rogues and Vagabonds; if they were, even his Majesty's License to the Theatre Royal would hardly be found to be legal. The Court were of Opinion that this was not to be considered as a Conviction; but yet they inclined to think that the Warrant was bad; because it was not set forth in it that the Defendant was a Vagrant. However, that the Parties might have an Opportunity of agreeing to try the Merits of this Question in a feigned Issue, it was consented to on all Sides, that the Defendant should be discharged out of Custody, upon his own Recognizance to appear in Court the last Day of this Term.

The King *against* Holford and others.

Vide antea
330.

Serjeant Hawkins coming to New Cause, he submitted it, that the Mandamus was well directed to the four Persons mentioned in the Rule. He did agree that one of them only had Possession of the Books, but yet all of them were assisting in forcibly taking them away. A Certiorari is directed to all the Justices in the County, though one only can have the Possession of the Thing which is to be removed. And he had a Precedent in his Hand of a Mandamus directed to four Persons to deliver over to the Register of the Bishop of Hereford Books belonging to his Office; which Precedent was 6 Will. 3. He conceived likewise, that there was no Occasion for a Mandamus to restore Mr. Bullen to his Office before he has the Books delivered to him. He did agree that there were Words in Bullen's Affidavit importing that he was turned out of his Office. But when the whole Affidavit is considered together, it appears that in Fact he was not turned out. The Corporation of Esham consists of nineteen Members; no Act can be done but by the Majority of the Persons present. The Mayor had given Notice of a Town-Meeting, and declared that the Intent of it was only for admitting Freeman; sixteen of the Members assembled accordingly for that Purpose; but when they were there the Mayor proposed the turning out Mr. Bullen, eight of the Assembly declared that this was against the Intent of the Meeting,

ing, and therefore went out of the Room. As they were going out of the Hall Doors they found it shut against them. Upon which they returned to the Room, and demanded of the Mayor Liberty to be let out, which he accordingly gave them. After this the eight Persons that remained, concurred in a Note for the turning out Mr. Bullen. The Serjeant submitted it, that in Judgment of Law this was no Removal, in as much as there was not a competent Number of Persons concurring in it. He produced a Precedent too, Hil. 9 Anne, where a Mandamus was directed to one Mr. Belley to deliver over to William Thorney the Records of the Tower belonging to the Steward of the Court. The Return made to it was, that Mr. Thorney had no Right to them. This was tried. And afterwards a peremptory Mandamus awarded. The other Side came into a Consent, that in Case the Court should be of Opinion to grant an Information in the Nature of a Quo Warranto against Yarnel, the Books should be delivered within a Week. And thereupon the Rule was discharged.

Middleton and his Wife against Croft.

L. 2. Sta. 1156. An. Dr. 57. 2. 2. 11. 650.

DR. Andrews came to shew Cause, why a Prohibition should not go to the Consistory Court of the Bishop of Hereford, to stay the Proceedings on certain Articles exhibited against the Defendants below for a Clandestine Marriage, on the Promotion of Croft. The Articles set forth, that by the Canons of the Church no Persons ought to marry, unless the Banns of Marriage between them are solemnized three Times, or they obtain a Licence from the Ordinary for so doing; that by the Canons the Hours of Matrimony are appointed between eight and twelve in the Morning; and that every Marriage ought to be solemnized openly in some Church or Chapel. The Articles charged the Defendants, that contrary to these Canons they married without Banns and without a Licence; that they married between the Hours of One and Eight in the Morning; and that they were married in the House of Thomas Allen a Clergyman. The Defendants suggested, that by the Statute of 7 & 8 W. 3. 35. the marrying without a Licence is made a Temporal Offence, and that the Ecclesiastical Courts have no Jurisdiction in it. They farther suggested, that by the Canon Law two competent Witnesses are required to every Fact; whereas by the Common Law one Witness is allowed sufficient; that they were lawfully married in the Diocese of the Bishop of St. David's, and not in the Diocese of the Bishop of Hereford in the Manner as set forth; and that they have but one Witness only to prove this Fact. Whereupon a Rule was obtained to shew Cause, why a Prohibition should not be granted. Mr. Strange was of Counsel on the same Side with Dr. Andrews, and they submitted it, that the Rule ought to be discharged. They said there was no Pretence for the Rule's being made absolute on Account of the Defendant's Proof; because they ought to have offered their Proof before the Ecclesiastical Judge, and to have made Affidavit here, that he refused it, which the

How far the Laity shall not be said to be bound by the Canons.

De.

Defendants have intirely omitted. There was no Pretence neither of having the Rule made absolute on that Part of the Articles which related to the Time of the Defendants marrying; for that is ascertained by the 102d Canon made in 1603, and the Statute in Question does not relate to it. There was no Pretence neither of having it made absolute on that Part of the Articles, which related to the Place where the Defendants were married; for that is ascertained by the same Canons likewise; and the Statute in Question has no regard to it. The Prohibition could not be made absolute neither with regard to the Wife; for though there is Remedy against her by the Ecclesiastical Law; yet there can be none on this Act of Parliament. The Question therefore will singly remain, whether the Prohibition ought to stay the Proceedings against the Husband on that Part of the Articles, which charges him with marrying without Banns and without a Licence. As to that it deserved to be considered, how the Law stood before the Act of Parliament. By the antient Canons of Archbishop Stratford long before the Time of H. 8. it is provided in these Words; *Sacerdotes Matrimonia clandestina celebrantes, ac hujuscemodi intereffentes, Sententiam Excommunicationis incurrant.* Linwood takes Notice of this Canon, and explains the Meaning of it to be, that all Persons of what Sort soever assisting in such clandestine Marriage, are within the Danger of the Penalty. By the 105th Canon in 1603 it is declared likewise, that every Licence granted against the Canons shall be void, and the Parties marrying contrary thereto shall be subject to the Penalties of clandestine Marriages. So that they presumed, that before this Statute there could be no Sort of Doubt, but the Parties marrying without Banns and without a Licence were punishable in the Ecclesiastical Court for so doing. The Difficulty then arises upon this Act of Parliament. They said, there were many Cases both in the Common and Statute Law to be found, wherein the Temporal and Ecclesiastical Courts have a concurrent Jurisdiction. In the Case of Kerby and Savil in this Court 1716, Savil had brought an Action in the Marshalsea Court against Kerby for calling her Bawd; she recovered Damages there, and afterwards commenced a Suit against Kerby for the same Words in the Ecclesiastical Court. A Rule to shew Cause was obtained, why a Prohibition should not be granted. Dr. Andrews himself came to shew Cause upon that Rule, and it was discharged; because the Suit in the Temporal Court was for Damages, the Suit in the Ecclesiastical Court for Reformation of Manners; and so diversis Rationibus ventilatur. To the like Purpose are many other Cases at the Common Law; to prove which Latch 244. Hob. 187, 192. 1 Lev. 198. Ven. 3. Sid. 146. Fitz. Nat. Brev. 50. and Townsend and Thorp, were cited. The like appears by various Instances on the Statute Law. By the Statute of Articuli Cleri, & Circumspecte agatis of 32 H. 8. 7. (2). by 2 & 3 Edw. 6. 13. (13). by 22 & 23 Car. 2. 10. Remedy is given to the Ecclesiastical Courts, where they had none before; yet the Remedy which the Temporal Courts had before, is not thereby imagined to be taken away. So by the Statute of H. 8. of Pluralities and Non-Residence, Remedy is given to the

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Temporal Courts; yet the Jurisdiction, which the Ecclesiastical Courts exercised before this Statute is enjoyed at this very Day. They said farther, that this would appear more plain in the present Case, if the Design of the Statute of William was considered; for it would be found, that it chiefly was to secure the Duty on Marriage Licences granted by a former Act. Mr. Clive and Mr. Gundry argued on the other Side. They said, they should not insist, that the Prohibition could be maintained on that Part of the Suggestion, which related to the Defendants Proof; but on the other Part of it they apprehended it well might. They said they by no Means took it to be a clear Point, that these Canons of the Archbishop bound the Laity, in as much as no Authority has been produced, that it was ever allowed in the Courts of the Common Law that they did. And as to the Canons in 1603, it has been determined, that they do not bind the Laity; for which Purpose they cited Salk. 412. But supposing the Ecclesiastical Courts had Authority to punish Lay Persons marrying without Banns and without a Licence before the Statute of William, by that Statute the Authority of Ecclesiastical Courts is taken away. They said there was no Precedence to say, that there was any Saving of their Jurisdiction in this Act of Parliament. And wherever there is no such saving Clause, the Nature of the Offence is altered by the Act; it is made Temporal, as before it was Spiritual; and consequently the Jurisdiction, which was before exercised, is thereby taken away. For this Purpose they mentioned the Cases of Sodomy, Rape, Witchcraft, and others of the like Nature. And where the Legislature has intended that the Ecclesiastical Jurisdiction should continue, a Saving is always put into the Acts, whereby their Jurisdiction is continued. This is so in the Statute of 1 Eliz. 2. 21 Eliz. 1. 1 Jac. 11. 4 Jac. 1. and 10 Ann. 19. (176, 177.) And particularly they relied upon Sir Thomas Jones 131. as a Case in Point for their present Purpose. The Chief Justice said, that undoubtedly the Canons of 1603 do not bind the Laity; and he doubted whether this particular Canon did of Archbishop Stratford for the Reason that has been mentioned. However he inclined to think, if the Ecclesiastical Courts had a Jurisdiction to punish Lay Persons before the Act for marrying without Banns and without Licence, the Statute did not take their Jurisdiction away. Judge Lee said that he likewise doubted, whether this Canon of Archbishop Stratford did bind the Laity. In the Case of Matthews and Burnet a Doubt was, whether the Ecclesiastical Courts could compel a Man to take a Licence for teaching a School. Lord Keeper Wright was of Opinion, that they could. But the Judges inclined to be of another Opinion. However, if the Jurisdiction of the Ecclesiastical Courts in the present Case could be made out before the Statute of William, he did not think that by that Statute their Jurisdiction was taken away. For this Purpose he mentioned the Case of The King against Sankey and Tibber in Lord Holt's Time. The Defendants there were Quakers, and sued in the Spiritual Court for Tithes. They came into this Court and insisted, that by the Statute of 7 & 8 W. 6. they were to be proceeded against before

before two Justices; and thereby the Authority of the Ecclesiastical Court was taken away. Lord Chief Justice Holt agreed, that where a Statute makes a Spiritual Offence to be an Offence of a higher Nature, the Nature of it is so far changed, as that the Spiritual Courts have no longer any Authority over it. But in the Case, that was before the Court at that Time, that Chief Justice said, that the Spiritual Court continued to have a Jurisdiction notwithstanding that Statute, and instanced the Case of a Pension, where he said the Ecclesiastical Courts have a Jurisdiction, notwithstanding the Opinion of Coke to the contrary. The rest of the Court inclined to be of the same Opinion with the Chief Justice and Judge Lee in the present Case. However, that these Points might receive a more solemn Determination, the Parties were ordered to declare in Prohibition by Christmas next. Vide postea.

Clark, Executor of Sarah Simonds, *against* Smith.

How far a
Quantum
meruit will
lie for Rent,
or not.

MR. Abney having before moved the Court, that one of the Judges would apply to Mr. Baron Carter to report the State of the Evidence in this Case, that appeared to him at the Trial, Judge Lee stated the Fact in the Manner following. There were two Counts in the Plaintiff's Declaration; one an Indebitatus Assumpsit for the Rent of certain Lands contained in the Declaration; the other a Quantum meruit on the same Account. The Land had been enjoyed by the Defendant upwards of Twenty Years, and one certain Rent of Seventy-seven Pounds five Shillings had been Annually paid for it. The half Year's Rent, that was due at Michaelmas last, the Testatrix demanded of the Defendant, and he told her he never paid the Michaelmas Rent till Candlemas, but then he would pay it. Upon this Evidence Baron Carter was of Opinion, that the Plaintiff could not recover; so directed the Jury to find a Verdict for the Defendant, which they accordingly did. Mr. Abney and Mr. Noel submitted it, that the Plaintiff was well intitled to recover upon this Declaration; for which Purpose they cited Lev. 179. Skin. 238, 242. 3 Mod. 73. 8. (7). 22. (22). 2 Keb. 8. and Sid. 279. And for this Reason they hoped, that a new Trial should be granted. Mr. Dennison was on the other Side, and prayed a Day to shew Cause, which the Court accordingly gave him. But afterwards, no Body appearing to shew Cause, the Rule was made absolute.

Gore and Gore.

THERE being a new Chief Justice now in Court, M^r. Peer Williams and M^r. Fazakerly argued this Case again. M^r. Peer Williams was Counsel for the Plaintiff, and stated the Case to be in the Manner following. The Testator William Gore, seised in Fee of the Manor of Barrow and the Manor of Carter-Haven in Somersetshire, made his Will in Writing the 15th of July 1718. The Manor of Carter-Haven he devised for Payment of his Debts. The Manor of Barrow he devised to Trustees for the Term of 500 Years without Impeachment of Waste, in Trust for the Paying an Annuity of 50 l. per Ann. to Thomas his eldest Son during his Life, and in Case the Annuity should be in Arrear, he gave Power to his eldest Son to distrain for the same in the Lands so devised to the Trustees. The Trust of this Term was farther declared to be for Payment of Debts and Portions for his younger Children, and in Case his eldest Son should marry, for raising a Jointure of 100 l. per Annum for every 1000 l. he should have with his Wife. He likewise gave Power to his younger Sons to charge this Term with Portions for their younger Children, viz. the Portions of the Issue Male to be paid at their Age of 21 Years, the Portions of their Issue Female to be paid at their Age of 21 Years or Marriage, which should first happen. The Remainder of these Lands he devised to the first and every other Son of Thomas his eldest Son to be begotten in Tail Male; the Remainder to Edward his second Son for Life, the Remainder to the Trustees in Trust to preserve Contingent Remainders; the Remainder to William his third Son in like Manner: the Remainder to certain other Persons; the Remainder to his own right Heirs. Some Time afterwards the Testator made two Codicils to his Will, thereby charging this Term with other Portions, and on the 4th of February 1718 he died. After the Death of the Testator Thomas the eldest Son married Mary Ward, and on the second of November 1728 had Issue by her William the present Defendant. Edward the second Son died without Issue. And now William the third Son brought his Bill against William the first Son of Thomas the eldest Son. And whether William the Defendant had any Title, was the Question for the Consideration of the Court. Upon this State of the Case M^r. Peer Williams submitted it, that the Defendant had no Title. He said he should not contend but the Intent of the Testator was, that the Issue of the eldest Son should take. And at the Time of making of the Will it was certainly possible that he might take. For Thomas might have married and had a Son before the Testator's Death; and if so, the Freehold would have vested in the Son immediately on the Testator's Death, and he would have taken by Way of a vested Remainder. But as the present Case happened to be, it was impossible that he could take by Way of vested Remainder, because he was not in Being at that Time. If he could not by Way of vested Remainder, his only

only Title must be by way of contingent Remainder, or rise by way of executory Devise. His Title cannot be by any way of contingent Remainder; because there is no Freehold, but only a Term in the Trustees to support it; and therefore the Difficulty to be considered in this Case is, whether he can take by way of executory Devise. It has been said that he shall, by Reason that the Limitation in the Will is to the Issue of Thomas to be begotten, and not to the Issue of Thomas begotten. But Mr. Peer Williams submitted it, that those Words have one and the same Signification both in Wills as well as Deeds; and for this Purpose he cited Co. Lit. 20. Ver. 345. He conceived then, that the present executory Devise was void, for three Objections that may be taken to it. First, that no legal or alienable Estate vested in the Son of Thomas till the Determination of the precedent Term. Secondly, because the Freehold is not to descend to the Heir at Law in the mean Time, but is devised over to Edward. Thirdly, because the Words of the Will have given him a Remainder, so that he must take in that way, and not in any other. With Regard to the first, every executory Devise is considered as an Original Independent Devise, not to be executed till the Time appointed for its springing into Possession; which is the Reason why it is called executory. And in the present Case the Time appointed for its springing into Possession is not to be till the Term of 500 Years determined. So this Case is to be considered in a Court of Law; for the Trusts of the Term in this Court cannot be regarded. But even supposing the Trusts of the Term should be regarded, yet still the present Devise cannot be good; because it by no Means appears that these Trusts will determine in twenty or thirty Years, which is the longest Time given for the expiring of such Interest, in the Case of Scatgood and Edge, Salk. 229. And farther on this Head was cited 3 Cr. 878. To the second Objection he observed, that the manifest Intent of the Testator was, that Thomas the Heir at Law should have no Benefit from this Estate, but the Rent-Charge of 50 l. per Annum; and therefore it would be a very extraordinary Thing to be said in a Court of Law, that a Freehold should descend upon him; and he submitted it, that the Freehold manifestly vested in Edward; the Estate was in him by Purchase; and when it is so, it shall never be divested out of him upon any Contingency happening afterwards. The Distinction between a Purchase and Descent in this Respect is taken in Co. Lit. and the Reason for the Difference is this; When an Estate is thrown upon one by Act of Law, it shall be divested out of him again when it is reasonable it should be so, because the Act of Law will do Prejudice to no one. But when an Estate is vested in one by Purchase, so it shall continue; because it was the Party's own Fault that he did not provide for the Contingency in a better Manner. He said likewise he conceived, if the Freehold descended upon the Heir at Law, there would be a Merger of his Rent-Charge; and thereby an Act of Injustice done to him. Then in Support of the third Objection he cited Salk. 226. And farther he relied upon the Authority which the former Resolution of this Case

had received. Mr. Fazakerly on the other Side said he should not contend, but in Limitations by Way of Descent the Words begotten and to be begotten have one and the same Construction; but in Purchases he conceived they did signify a different Description of the Person; for this Purpose he cited the Case of Darlyson and Newman, Hill. 11 Ann. in the Court of Exchequer; and farther relied upon Lev. 135. and Raym. 82. He said he should not contend likewise, but the Opinion which the Judges of this Court had before given in 1720 was something against him. He owned they did give their Opinions that the Freehold vested in Edward, and that the Issue of Thomas could not take by way of executoy Devise; because the Time limited for their taking was not such a reasonable one as is limited by the Law for these Purposes. But he observed that William the present Defendant was not born when the Court gave that Opinion; and therefore this Fact happening since, the Point in Question is now more immediately before the Court than it was at that Time. And as to that, he said he conceived that immediately upon the Birth of William the Estate vested in him by way of executoy Devise, and was then executed, and that in the mean Time the Freehold descended upon the Heir at Law. He said this would be no Merger of the Rent-Charge; because he has not the Possession of the Freehold, so as that he can have any Profit arising from it; and therefore he may well enjoy the Rent-Charge out of the Term notwithstanding. If this Devise then was to take Effect in William immediately upon his Birth, it certainly must take Effect within the Compass of a Year after the Lives in Being. And to shew that this Court has allowed the Time for these executoy Interests longer than the Lives in Being, he cited Moor 847. Rol. Abr. 612. (3.) Shower's Parliament Cases 137. Ver. 234. The Case of Hodgkins and Andrews, Pasch. 1730, and more particularly relied upon the Case of Pots and Pots, determined by the Master of the Rolls the 6th of July 1732, and affirmed by the Lord Chancellor this present Term. The Court said that they would take Time to Consider of this Case before they gave their Opinions; Accordingly ordered it to stand over. And on Saturday January 16, 1733, the Court certified their Opinions, that the Devise was good.

Kent and May *against* Kent.

UPON a Writ of Error on a Judgment in the King's Bench in Ireland affirming a Judgment of the Common Pleas there, a special Verdict appeared to have been found to the Effect following; that after the first of May 1721, the Demandant married her late Husband, who was at the Time of his Marriage with her under the Age of twenty-one Years. They find that at the Time of Marriage his Father was seised of an Estate of Inheritance of 50 l. per Annum, and that the Marriage was had without Consent of his Father, Guardian, or Lord Chancellor. They farther find, that the Demandant used no subtle Means to induce the Deceased to marry her; and

When an Error is in the Judgment itself, how far the Party for whose Advantage the Error is, may assign it for Error.

whether upon these Circumstances the Demandant should be barred of her Dower, was the Doubt, which they submitted to the Court. Upon this Verdict the Court of Common Pleas in Ireland gave Judgment for the Demandant. Mr. Strange now argued on Behalf of the Plaintiffs in the Writ of Error, and submitted it, that the Judgment was erroneous. The Question in this Case he said arises upon an Irish Act 6 Ann. 16. 137. which is intituled An Act to prevent Persons marrying Children against the Will of their Guardians. The first Clause of the Act provides, That if any Person shall by any subtle Means marry a Man under the Age of twenty-one Years, having an Estate of Land of the yearly Value of 50 l. or personal Estate of the Value of 500 l. or shall procure the eldest Son of such Person to marry her without Consent of his Father, Guardian, or Lord Chancellor, such Person shall be barred of her Thirds, and every other Provision out of his said Estate. The next Clause follows in these Words; And be it enacted by the Authority aforesaid, that all Persons who shall be accessory, aiding, abetting or procuring before the Fact committed in all and singular the several Offences herein before mentioned, being lawfully convicted thereof, shall suffer three Years Imprisonment. Upon the State of this Case Mr. Strange submitted it, that the Intent of this Act of Parliament was to prevent a great Inconvenience, which before happened in young Gentlemen of Estates, or who were Heirs to Estates, marrying without proper Advice of their Friends and Relations. For this Reason the Act was to be construed largely, in order to remedy the Mischief more effectually. And therefore he conceived that in the present Case, though the Demandant used no subtle Means to procure the Marriage; yet in as much as she did marry the Party without the Consent required by the Act, she was an Offender within the Meaning of it. He then took Exceptions to several Parts of the Record; First, that it appears by the Placita, the Writ of Dower was not brought till two Years after the Death of the Husband; so that the Demandant has voluntarily delayed herself; and yet she has recovered Damages to the Value of the Land, from the Time of her Husband's Death; for which Purpose he cited Co. Lit. 32. Secondly, upon computing the several Parts of the Damages and Costs given in the Common Pleas, it appears that she ought to have recovered 158 l. 16 s. 3 d.; whereas by the Quæ quidem Damna she has Judgment only for 158 l. 15 s. 3 d.; so that 1 s. is omitted; and he apprehended that in the Case of Tensh and Dalton, Pasch. 3 G. 1. it was clearly agreed that every Thing given by the Jury must be disposed of either by a Remittitur or other Ways. Thirdly, in the Judgment of the King's Bench below, the Sum of 312 l. 12 s. 9 d.; is given for Damages, and 35 l. 4 s. 7 d. for Costs, which can only be in Pursuance of the Statute of 3 H. 7. 10. and yet it is not said in the Judgment, to be given pro dilatione Executionis; whereas all the Precedents are in that Manner. Fourthly, it appears by the Record, that there had been a former Writ of Error brought by May, an Ancestor of one of the present Plaintiffs in Error, together with Kent the other Plaintiff in the Writ of Error; that May died, whereupon the Writ abated; that thereupon May, one of the present Plaintiffs in the Writ of Error, joined in a new Writ of Error with Kent, and consequently

consequently May, one of the present Plaintiffs in Error ought to have been subject to have answered the Damages upon this Writ of Error on the Affirmance of the Judgment, as well as Kent; and yet the whole Sum of 312 l. 12 s. 9 d.; and the 35 l. 4 s. 7 d. are charged upon Kent only. Lastly, that the Plaintiffs in Error are amerced pro falso Clamore, which they ought not to have been. Mr. Parker argued on the other Side, and as to the Construction of the Act of Parliament, he submitted it, that the Demandant by no Means ought to be debarred of her Dower; for this Purpose he cited Hob. 182. Cr. 481. and And. 115. which are Constructions upon 3 H. 7. 2. an Act something in the same Nature with the present one. He then answered the several Exceptions that had been taken to the several Parts of the Record. To the first he said the Writ of Dower was not removed up by Certiorari; and therefore the Plaintiffs in Error could not take Advantage of this Exception. Besides he said they did not come in upon the Summons the first Day, and offer to render Dower, pleading that they always were ready and still are to do so, which they ought to have done by the very Authority of Co. Lit. 32. which has been cited, in order to have discharged themselves from Damages. To the second, this is only a Miscomputing of the Sums, and therefore may be rectified by the Court. To the third, the Court is not bound to give a Reason for their Judgment; for which Purpose he cited Stiles 290. Farresley 154. Besides, if this Part of the Judgment was wrong, the Judgment may be reversed as to this Part; and affirmed as to the other; because this Part of the Judgment is by Statute, the other by Common Law. For this Purpose he cited the Case of Waller and Green, 13 Will. 3. Rot. 20. To the fourth, the Veit is joined only to exonerate the Lands; for which Reason he had nothing to do with the Damages. 1 E. 3. 12. 3 E. 3. 11. And to shew that in like Instances the Party has not paid Costs upon the Statute of H. 7. Mr. Parker cited Cr. 425. Lev. 146. Ray. 134. Ven. 88. To the last Exception, he said that by an Irish Act all the Statutes of Jeofails here, are in Force there; and here this Defect after a Verdict would certainly be cured by the Statute of Ch. 2. The whole Court were clear of Opinion that all the Exceptions were answered, except the last but one. And even as to that, the Chief Justice doubted whether the Plaintiffs in Error could take Advantage of it, in as much as they had both joined together in the Assignment of Errors, and had not summoned and severed, there being no Damages given against May, is for his Advantage. Kent is the only Person that has Reason to complain of that; and if he would take Advantage of it, he should have summoned and severed. That he has not done; and therefore he inclined to think that Matter could not now be taken Advantage of. However, a few Days after, the Chief Justice said, that he and the rest of the Judges of this Court had considered together upon this Point; and in as much as this seems to be an Error in the Judgment itself, they inclined to be of Opinion that even the Party for whose Advantage the Error is, may assign this Matter for Error; for this Purpose he mentioned Bercher's Case, Rep. 8. Yel. 107. and Rol. Ab. 759. Judge Lee said

said too, that 4 Leon. 61. was to the same Purpose. However the Court agreed, that they might reverse the Judgment in this Part, and affirm it as to the other; because this Part of the Judgment is by Statute, the other by the Common Law. But this Matter was ordered to stand over to be farther considered of. Vide postea.

The Parish of Oakhampton *against* The Parish of Kent.

How far a
Person shall
be said to
gain a Set-
tlement, or
not, by pay-
ing to the
Parish Rates.

IN an Order of Sessions the Fact was specially stated, that one Edward Lake came into the Parish of Kent, and lived there between two and three Years as a Tide-waiter; that he was charged with the Land-Tax by the Parish Officers the first Year; which he accordingly paid; but afterwards this Money was repaid him by the Collector; and the Collector himself paid this Tax the remaining Part of the Time, that he continued in the Parish. Upon this State of the Fact the Justices in their Sessions were of Opinion, that this was no Settlement. Serjeant Chappel submitted it, that it was by 3 & 4 W. 11. and for this Purpose cited Comb. 410. 1 Mod. 331. though he did agree, that by 9 Geo. 2. the paying to the Scavenger's Rate for the Repairing the Highways gains no Settlement. Accordingly the Court made a Rule to shew Cause, why the Order should not be quashed, And the last Day of Easter Term following the Rule was made absolute.

Strawn *and* Fleter.

Vide antea
344.

MR. Taylor brought in the Writ of Inquiry; but submitted it, that the Plaintiff was well intitled to enter such Judgment as he could by Law. The Court was of the same Opinion. Accordingly the former Rule was discharged. *Ex relatu.*

Anonymus.

Vide antea

MR. Marsh came now to shew Cause, and said that the Fact was, that the Defendant was elected the 5th of April last, came of Age the 20th, sworn in the 26th, and did not act till afterwards. Upon this State of the Fact he submitted it, that as the Defendant was of Age before he was sworn into the Office, it was clear that he was capable of acting afterwards. And, even supposing that the Defendant had not been of Age at the Time he was sworn in, he apprehended, the Law was the same. He did agree, that an Infant was not capable of a judicial Office, but of a Ministerial one he is. For this Purpose he cited Co. Lit. 3. And said, that at Common Law he believed it was always thought that an Infant was capable of sitting in the House of Commons. The Chief Justice said, that he believed the last Case that was mentioned was never solemnly determined. And as to the principal Case he inclined to

to be of Opinion against the Defendant. Accordingly the Rule was made absolute.

Anonymus.

ON Rule to shew Cause why a Mandamus should not be directed to Dr. Bettlesworth, Judge of the Prerogative Court, requiring him to grant Administration of the Goods of the late Earl of Suffolk to the present Earl of Suffolk his Son, the Countess Dowager having renounced; Dr. Hisham said, that the State of the Fact was in this Manner. On the 17th of October last, soon after the Death of the late Earl, a Caveat was entered by his Creditors. On the 2d of November the Countess Dowager executed a Deed, thereby renouncing all Right and Title to the Administration. Her Proctor produced this Renunciation before the Officer, and he admitted it. Upon which the Creditors withdrew their Caveat. On the 13th of November Complaint was made to Dr. Bettlesworth, that the Renunciation ought to have been upon Oath; and that the Caveat therefore was withdrawn by Surprise. Upon which Dr. Bettlesworth ordered, that the Countess Dowager should either exhibit an Inventory, or declare upon Oath, that she had not intermeddled with the Effects, before the Renunciation should be admitted; and that when she had so done, and not before, Administration should be granted to the present Earl. Upon this State of the Fact Dr. Hisham submitted it, that the Proceedings below were very regular; and therefore the Rule ought to be discharged. The Chief Justice said he did agree that the Judge of the Ecclesiastical Court has a Power to object to the Security which any Person shall offer, who prays for Administration; and therefore that a Caveat for that Purpose is very proper. However he did not know, that in the present Case the Judge of the Ecclesiastical Court had any Method of compelling the Countess Dowager to deliver in such an Inventory, or to make such an Oath; and therefore he could not think that the Administration could be delayed to be granted till that Time. For which Reason he thought the Mandamus ought to go. The rest of the Court were likewise of the same Opinion. And Judge Page said, in case where there is a Will, he did agree that a Renunciation of the Executor is necessary; because he has something in him before Probate. But the Widow or next of Kin have nothing in them before Letters of Administration granted; and therefore in such Case he could not think a Renunciation was reasonable. Judge Probyn said that Dr. Bettlesworth himself has ordered, that in Case the Countess Dowager renounces, the Administration shall be granted to the present Earl; therefore now the Mandamus is proper to be directed, that the Administration shall be granted to the present Earl by Name; otherwise it might properly have been excepted to the Mandamus, that it ought to have been general. Judge Lee said that he thought it very proper, that Dr. Bettlesworth should make a Return to this Writ. Accordingly the Rule was made absolute.

How far a Mandamus is proper to be granted, in order to require the Ecclesiastical Court to grant Administration to a particular Person.

Hall and Chapman and others.

When there is a Verdict on one Part of the Record, and a Demurrer on the other Part of it, how far the Court will not arrest the Judgment till the Event of the Demurrer be determined.

IN False Imprisonment brought against three, one of the Defendants pleaded Not guilty to the Whole; the other two pleaded Not guilty as to Part, and justified as to the Residue. The Plaintiff joined Issue with that Defendant, that pleaded Not guilty to the Whole; and Verdict found for the Plaintiff. He likewise joined Issue with the other Defendants on that Part of their Plea, which was Not guilty, and demurred to their Justification. The Demurrer was not yet determined. Upon which Mr. Draper obtained a Rule a few Days ago to shew Cause, why the Judgment should not be stand upon the Verdict, till the Demurrer determined. Serjeant Belseld came now to shew Cause, and submitted it, that the Court would not arrest the Judgment on this Account; but would leave the Plaintiff to do as he could by Law. The Court was of the same Opinion; accordingly the Rule was discharged.

Clever and Jordon.

How far the Court will not arrest a Judgment notwithstanding a Defect in the joining of the Issue.

AFTER a Verdict, Serjeant Alder moved in Arrest of Judgment, that in joining the Issue by the Plaintiff in his Replication the Christian Name of the Defendant was repeated, and the Christian Name of the Plaintiff quite omitted. In the Case of Cowper and Spencer, Michaelmas 12 Geo. 1. he said the Opinion of the whole Court was, that if the Similitur is omitted, that Defect is not cured after a Verdict, by the Statute of 16 & 17 Car. 2. 8. That Case he said was put into the Paper to be argued, and Mr. Strange and himself were both of Counsel in it. In the present Case likewise he apprehended, that this Defect was not cured by the Statute; because the Defendant could not have demurred, and shewn this for Cause; so that he submitted it, the Defendant had no other Way to take Advantage of the Defect, but this. The Chief Justice said, in Lord Holt's Time this very Exception was over-ruled. And so Judge Lee said it was in the Case of Rawborn and Hitchman, Pasch. 9 Geo. 1. and of Probyn and Chapman, Mich. 5 Geo. 2. Accordingly the Serjeant took nothing by his Motion.

Carey and Hintol.

IN Trespass for entering a Close, called Pinfworth-Feild, the Defendant pleads, that the Close in Question was the proper Land of the Defendant; the Plaintiff replies, that the said Close was the Estate of Inheritance of the Plaintiff, and not the proper Land of the Defendant. Upon which Issue was joined, and a Verdict found for the Plaintiff. It was moved in Arrest of Judgment, that this was an immaterial Issue; and a Rule made to shew Cause for that Purpose. Mr. Dennison came now to shew Cause, and said that he did agree the Issue was Informal, like the Cases in 5 Rep. 43. 2 Bulst. 1. Moor 464. and Sid. 289. but submitted it to be nothing more; and therefore pray'd that the Plaintiff might have his Judgment. The Chief Justice said, that that Part of the Replication, namely, that the said Close was the Estate of Inheritance of the Plaintiff, cannot be sufficient; for that imports no more, than that the Plaintiff had an Estate of Inheritance in the Land, which of itself is not sufficient to maintain an Action of Trespass. And as to the other Part of it, namely, that the Close was not the proper Land of the Defendant, that imports no more than that the Defendant had not the Property in it; which he thought would hardly be sufficient neither. Judge Page was of a contrary Opinion. The Plaintiff, he said, by his Replication, has followed the Words of the Defendant's Plea. He did agree that the Plea would have been bad upon a Demurrer; but then the Judgment shall be against him that commits the first Fault. For which Reason he was of Opinion, that Judgment should be for the Plaintiff upon the Declaration. The rest of the Court inclined to be of Opinion with the Chief Justice. Judge Probyn said, if the Plea was bad, the Plaintiff's Issue joined upon it must be bad likewise; and therefore the present Case differed from that, which it would have been in Case of a Demurrer. Judge Lee said that he did believe the Intent of the present Plea, now in English, was to answer the Plea of Liberum Tenementum, when in Latin. But the Meaning of that Plea was, that the Defendant had an immediate Right to enter upon the Possession, as his Freehold. He thought the Words of the present Plea could not signify that; accordingly this Matter stood over. Vide postea.

How far an Issue shall be said to be immaterial, or not.

Chart and Withers.

THE Irregularity of this Judgment having been referred to the Master, he reported the Fact in this Manner: The Plaintiff by Mistake gave Rules to plead in the Common Pleas, instead of this Court. The Defendant not knowing of this Mistake applied to Judge Page, that the Rules for pleading might be enlarged. The Plaintiff attended upon the Summons taken out for that Purpose, and the Rules were enlarged to a certain Day by Consent of both Parties. The Defendant did

How far a Defect shall be said to be cured by enlarging the Rule.

did not plead within the Time given him by the enlarged Rule; and upon that the Plaintiff signed his Judgment. Mr. Murrey submitted it, that this Judgment was irregular for two Reasons; First, because the original Rules for pleading were as no Rules. Secondly, because the Plaintiff did not call for a Plea after the enlarged Rule. The Chief Justice said as the enlarged Rule was by Consent, he thought it cured all Defect in the original one; and he should have been of the same Opinion, if no Rule at all had been given originally. He said likewise, that this second Rule being by Consent, the Defendant has thereby agreed to plead within the Time mentioned in it; and therefore the calling for a Plea was unnecessary. Accordingly the Court held the Judgment to be regular.

The King and Kempson.

Vide antea
319.

MR. Parker coming now to shew Cause, Mr. Abney took a third Exception to this Order, beside the two other, which he had before taken, which was, that the Son's Wife appeared to have been an Adulteress; for it is stated in the Order, that the Husband for some Years had no Access to her, and yet that she had had a Child in the mean Time; and therefore he apprehended the Husband himself would not have been bound to maintain her; a Fortiori the Husband's Father could not. To shew that the Husband himself would not, he cited Lord Raymond's Opinion at Nisi prius, in the Case of Morris and Martin, 12 Geo. 1. That was an action brought against the Husband for Necessaries laid out by the Plaintiff on Account of his Wife. The Husband proved that his Wife lived in Adultery with another Man. Lord Raymond was of Opinion for this Reason, that the Action would not lie against the Husband, though the Plaintiff had no Notice of her living in this Manner. Mr. Parker then answered the several Exceptions that had been taken. To the first he said, this Order is mentioned to be made on Appeal against Samuel Kempson the Elder, not against any Order of Justices before made; and therefore he conceived the Word Appeal there signified no more than Complaint. To the second he observed, that Orders of Maintenance made upon Relations in Law, have often been allowed, as well as upon Natural Relations; for this Purpose he cited Bul. 345, 346. Keb. 489. To the last he said, whatever Effect this Act of the Wife might have upon the Husband, it could not have any upon the Parish. The Chief Justice said that he thought the first Exception and the last were both answered. But as to the second, he was of Opinion that it was fatal. He said he well remembered the Case of The King and Monday that has been cited. The Cases that Mr. Parker has mentioned, were cited in that Case; and yet upon great Debate the Court was of Opinion the Act did not extend to Relations in Law. Accordingly in the present Case the Rule was made absolute.

The King and Latter.

MR. Fazakerly coming now to shew Cause, he urged the same *Vide antea* Reasons which the Chief Justice had before mentioned; 330. accordingly the Rule was discharged. *Ex relatu.*

The King against The Bishop of Litchfield and Coventry.

A Few Days ago M^r. Parker obtained a Rule for superse- *How far a*
ding a Writ of Mandamus directed to the Defendant, re- *Mandamus is*
quiring him to grant a License to M^r. Rushworth, appointed *proper to be*
of the Free Grammar School of Coventry, founded by John *granted, or*
Hales in the Time of Henry the Eighth, for the teaching *not, in order*
this School. He then said that by the seventy-seventh Canon *to obtain a*
in 1603. the Bishop of the Diocese is intrusted with granting *License for a*
these Licenses. In this he acts judicially, and not ministeri- *School-Ma-*
ally; and for that Reason the present Mandamus cannot be *ster.*
proper. In Case the Bishop refuses a License without Reason, the Party may appeal. And of this Opinion, he said, the Court was in the Case of Tatler and Reynolds, Mich. 10 Will. 3. And in Pollice's Case afterwards, Lord Macclesfield, Judge Eyres and Judge Powis inclined to be of Opinion that a Mandamus would not lie. He said the Business of a School-Master is not an Office, but an Employment. But the present Case is not even so strong as that; for M^r. Rushworth is only appointed Usher. He observed likewise, that the present School is a private one, and not a Royal Foundation. Serjeant Birch and M^r. Makepeace now moved to discharge the Rule for superseding this Writ. They said they believed it was never yet settled, that an Usher was bound to take a License; and therefore it was proper that the Bishop should make a Return to this Mandamus, in order that that Point might be fully settled. But if a License was necessary, they conceived that a Mandamus was a proper Remedy, in order to obtain it; for this Purpose they cited several other Cases of the like Nature, in 1 Sid. 107, 94, 169. 2 Inst. 309. 3 Keb. 855. Ven. 115, 187, 143, 153, 335. And the Serjeant said a Mandamus was before moved for against this very Bishop, requiring him to grant a License to one to teach the School of Brumfield in Derbyshire. Indeed it was not granted, because the Affidavit which the Motion was made upon, was not sufficient. But he took the Opinion of the Court to be, that a Mandamus would lie. The Chief Justice said he did not think it a clear Point, that a License was necessary in the present Case; and therefore it was proper that a Return should be made, in order that the Point might be settled. But if it was necessary, he did not see but a Mandamus was the proper Remedy. He did agree, that the Business of a School-Master was only an Employment; but yet it is a temporal Employment, and therefore this Court might interfere. In the Case of Colefat and Newcomb, Mich. 4 Ann. The Op-
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nion of Mr. Justice Powel was, that the Court might grant a Mandamus in Case of a License for a Preacher, by the Statute of 13 & 14 Car. 2. 4. And in the Case of Mr. Vincent, this Court did actually grant a Mandamus for the License of Preaching at the Lectureship of St. Dunstons; though afterwards for some particular Reasons the Rule was discharged. No Instance he said had been produced, that ever an Appeal lay in these Cases. And if a Mandamus would lie in the Case of a School-Master, he did not think but it equally would in Case of an Usher. Judge Lee said that he remembred Pollice's Case cited by Mr. Parker. Mr. Justice Pratt was strongly of the other Opinion, even upon the first Argument; and upon the second, the three other Judges came over to his; accordingly the Rule was discharged for superseding the Writ in the present Case. Vide postea.

Term Hill.

7 Geo. II. 1733.

Anonymus.

MR. Marsh moved for a Prohibition against the Bishop of Peterborough to stay Proceedings against Philip Do-
 deridge for keeping an Academy and Dissenting Meet-
 ing House at Northampton, without a Licence, which
 the Canons in 1603 require. A Suggestion was made in the first
 Place, that those Canons do not bind the Laity; and in the
 next Place, that the Statute of 1 Jac. 1. 4. hath given a Pe-
 nalty for this Offence; accordingly he cited the Case in
 Carth. 464. and the Court made a Rule to shew Cause. Ex
 relatu. Vide postea.

How far the
 Canons of
 1603 do not
 bind the
 Laity.

Cumber and Hill.

IN Ejectment for the Moiety of certain Lands in Suffex, on
 the Demise of John Jervis and Anne his Wife, a Special Ver-
 dict was found to the Effect following; That Richard Holden seised
 of the Premises in Question in 1698 made his Will, and
 after having devised certain intermediate Estates, the Words
 of the Will followed in this Manner; I give and devise my said
 Lands to my Grandson Richard, the Son of my Son Thomas Holden, and
 to my Grandaughter Elizabeth Holden, equally to be divided between
 them, and to the Heirs of their respective Bodies; and in the Default of
 such Issue, I give the same to my Grandaughter, Anne Holden and her
 Heirs for ever. The Jury found that Richard died without Issue,
 and that Anne Holden married with John Jarvis the Lessor of the
 Plaintiff. Serjeant Darnel argued for the Plaintiff, and said
 that the single Consideration for the Court was, whether the
 Words in the Will conveyed Cross Remainders. He submit-
 ted it, that they did not; and said that there were no Words in
 the Will discovering such Intent. Serjeant Belkeld argued on
 the other Side, and said he did agree that the Cases in 2 Rol.
 Abr. 416, and 2 Cr. 655. were Authorities against him, but sub-
 mitted it, that the Case in 4 Leo. 14. and that of Holmes and
 Meynel, reported in Ray. 452. Pol. 425. Sir Thomas Jones 172.
 and reported likewise in Skin. 17. were Authorities full in Point
 for his Side of the Question. He observed that this Case of
 Holmes

How far the
 Words of a
 Will shall be
 said to con-
 vey Cross
 Remainders,
 or not.

Holmes and Meynel was directly against the Case in 2 Cr. 655. and that the Case in 2 Rol. Abr. 416. was cited in the Case of Holmes and Meynel directly denied to be Law. Serjeant Darnel by way of Reply said, that he well remembered the Case of Holmes and Meynel; there the Words of the Will were, I devise all my Lands to my two Daughters, and in Case they die without Issue, then to my Nephew Francis. In that Case great Stress was laid on the Word all, that Francis was to have all the Lands, and it was insisted upon, that he ought to have them all together. Great Stress was likewise laid upon the Words in Case they happen to die without Issue, and it was insisted that they both must die without Issue, before Francis could have them. And great Stress was laid on this Circumstance likewise, that Francis the Nephew was a remote Relation. Nothing of which was in the present Case. The Chief Justice and Judge Page inclined to be of the same Opinion with the Plaintiff. However, this Matter stood over. The next Term it was argued again; and then was adjourned for the Opinion of the Court. Vide postea.

The King against Griffin and Banyere.

Vide antea

THIS Matter now came on in Arrest of Judgment. Serjeant Eyres and other Counsel argued for the Defendants. They submitted it, that the Writing which the Information was founded upon, was no Libel. The Purport of it was, that the Church-wardens declared that they would adhere to their first Notice, as to changing the Time of Meeting from Sunday to Thursday, and desired the Parishioners to meet in order to correct the several Abuses, which by Reason of the pretended Authority of the Trustees have been suffered to be committed. The Counsel observed, that the Persons publishing this Notice were Church-wardens and Overseers, whose Office required them to look into all Abuses relating to the Poor; and therefore they conceived that these Officers could not be charged with doing any Thing beyond their Duty in this Matter. They then took several Exceptions to the Form of the Information; they said it was no where set forth by what Authority the Workhouse was created, and they conceived that no Workhouse could be erected but by Authority of Parliament. The only two Statutes which give Countenance to this Matter are those of 39 Eliz. and 9 Geo. 1. The 39 Eliz. relates only to private Endowments; no such Endowment is shewn in the present Case; and therefore this Workhouse cannot be justified under that Act of Parliament. The 9 Geo. 1. requires several Particulars, not one of which appear to have been observed; and therefore this Workhouse cannot be justified under that Act of Parliament neither. Another Exception taken by them was, that the Names of several of the Trustees are omitted in the Information; and they conceived that the Names of all of them should have been set forth, in order that a Conviction on this Information might be pleaded in Bar of another; and for this Purpose they cited Brook's Abridgment, Title Indictment.

Pla.

Pla. 21. Shower 381, 391. Carthew 267. and 2 Leon. 39. And lastly they insisted upon it, that the Persons described in the Information did not appear to be the same with those mentioned in the supposed Libel. This Paper plainly referred to a former one written by the Trustees themselves, and in that they have declared them to be Trustees appointed by the Vestry; but in this Information the Persons described to be injured, are only said to be Trustees appointed by the Parishioners. A Meeting of the Parishioners only, does by no Means make a Vestry; but a Meeting of them under a Notice given in the Church; for which Purpose he cited Lane 21. And for these Reasons submitted it, that the Judgment ought to be arrested. The Chief Justice said that he did not indeed think that there was any Thing more charged upon the Trustees, than the Breach of a private Trust; but yet such Charge might be libellous, and he thought the Import of the present Paper plainly of that Effect. He then considered the Objections with Regard to the Form of the Information. In answer to the first of them he thought it by no Means requisite to be set forth by what Authority the Workhouse was erected. With Regard to the second, he did allow that in Informations for Libels on private Persons, the Names of some one must be inserted; but never understood that the Law required that all their Names must be so. The last Objection seemed to him to be of the greatest Weight; but yet he thought it might be answered; for there seemed to him no Inconsistency between that Description of the Persons set forth in the Libel, and that set forth in the Information. For the Trustees might have been appointed by the Parishioners, and yet by Order of the Vestry; and great Reason is there for understanding that they were so, in as much as by the Innuendo it is alledged that three of the Trustees by Name, with the rest of them, were reflected on by the Libel. Judge Lee said that indeed in the Case of The King and Orm, Trin. 11 Will. the Court were of Opinion that the Information for the Libel was not good, because the Names of no one Person injured by it were inserted; but he never thought the Names of all of them were necessary to be so; accordingly the Court gave Judgment for the King.

Burdy and Hosier.

THE Defendant had been discharged out of Custody for not having been taken in Execution in due Time; and now the Plaintiff brought Debt upon the former Judgment. Upon which Mr. Marsh moved, that the Defendant might be admitted to common Bail. But the Court refused the Motion; by Reason that this was not the second Action brought on the Judgment, but the first. And for this Purpose Judge Lee mentioned the Case of Chambers and Robinson. However afterwards the Court made a Rule to shew Cause.

When an action of Debt is brought upon a Judgment, how far special Bail shall be required, or not, in such Action.

The King *against* Duffin and others.

How far the
Presence of a
Mayor is ne-
cessary to be
at a Corpo-
rate Assem-
bly.

MR. Abney moved, that a Rule to shew Cause might be made absolute, for granting an Information in the Nature of a Quo Warranto against the Defendant Duffin, for acting as Mayor of the Borough of Orford, and likewise against several other Defendants for acting as Capital Burgeses of the Borough, the Validity of whose Election depended on the Election of Duffin. The Constitution of this Borough consisted of a Mayor, eight Portmen, and 12 Capital Burgeses. The Capital Burgeses have a Power of nominating two of these Portmen to the Inhabitants, and the Inhabitants appoint one of them to be Mayor for the Year ensuing. The Charter-day is the Monday before the Feast of St. Michael. And when Duffin was chosen to be Mayor on the Charter-day no Mayor was present at the Assembly, by Reason that Scolden the former Mayor had at that Time Judgment in Quo Warranto given against him. Upon this State of the Case M^r. Abney submitted it, that the Election of Duffin was illegal, and the Court inclined to be of the same Opinion. The Chief Justice said he did agree, that wherever any Business is to be done by a particular Part of a Corporation only, the Presence of the Mayor is not requisite at the Assembly; but wherever the Business is to be done by the whole Corporation at large, the Presence of the Mayor is absolutely necessary. In the present Case he thought all the Members of the Corporation had a Voice in the Election; accordingly the Rule was made absolute.

The King *and* Trew.

How far a
Member of a
Corporation
shall be said
to be duly
sworn into
his Office, or
not.

ON Rule to shew Cause, why an Information in the Nature of a Quo Warranto should not be granted against the Defendant for acting as Mayor of the Borough of Weeram; the Case appeared to be in this Manner. By the Affidavits, on which the Rule was made, two Objections were made against the Defendant; the first touching his Election; the other, the Swearing into his Office. As to his Election, the Affidavits were not so positive as they ought to have been; and on the other Hand, the Objections were only answered by the Affidavit of the Defendant himself, though they related to such Matters, as others might have made Affidavit concerning. As to the Swearing into his Office, it was objected it was not done in a proper Manner, by Reason that the Charter requires, that no Court of Record shall be held but before the Mayor or his Deputy, and it was insisted upon that he ought to have been sworn in at such Court, which was not done; for he was only sworn in before two Capital Burgeses, the late Mayor being absent. As for this last Objection the Charter appoints, that the Election of the Mayor shall be on the Tuesday next after the Feast of St. Luke, and if the Mayor elect be present, he shall then take his Oath of Office; if he be not present, he shall

take his said Oath at the next Court of Record to be holden before the late Mayor, if such late Mayor be alive and present; and if such late Mayor be dead or absent, tunc coram aliis Capitalibus Burgensibus, vel duobus eorundem tunc ibidem presentibus. Upon this State of the Case, the Counsel for the Defendant submitted it, and the Rule ought to be discharged. The Objections with regard to his Election they said were but imperfectly made out even by the Affidavits themselves, on which the Rule was obtained, and these Objections were fully answered by a positive Affidavit of the Defendant. As to the Manner of his being sworn in, they conceived it to be clearly regular. In case the late Mayor had been dead, for Necessity sake the Swearing would have been good before the two Capital Burgesses; and they thought there was equal Reason to say it should be so under the present Circumstances. With regard to the first Exception, the Chief Justice said he should have intirely been for discharging the Rule, had the Affidavit on the other Side been made by any other Person but the Defendant. But in these Informations, which are to try a Right, he thought the Rule for shewing Cause ought never to be discharged meerly upon the Affidavit of the Defendant himself, where other Affidavits might have been had. As to the last Objection he inclined indeed to be of Opinion, that the Swearing was regular, for the Reason that had been offered. However as this was a Question depending on obscure Words of the Charter, he thought this Matter might deserve farther Examination. The rest of the Court were of the same Opinion; accordingly the Rule was made absolute. Vide postea.

The Bishop of Landaff and The King.

THIS Matter now coming on again, Mr. Strange argued for the Plaintiff in the Writ of Error. He said, there were three Points to be considered in this Case. The first, whether a Presentation was necessary to be laid in the Count. Secondly, Whether the present Commendam amounted to a Presentation; and thirdly, if it did not, Whether the Want of it was cured by the Clergy. With regard to the first he took the Rule of Law to be general, that in the King's counting in Quare Impedit as well as in a private Person's, a Presentation must be laid, unless in some particular Cases for which particular Reasons may be given. He said the Precedents in Co. Ent. 493, 509, 512, 514, 516, 520. Rast. Ent. 505, 528, 529, 530. Lutw. 1078, 1083, 1086, 1090. are all in this Manner; and so is it held to be necessary in Fitz. Nat. Brev. 33. Roll's Abr. 378. and Vau. 53, 56, 57. With regard to the second Point, he said the present Commendam was a Commendam retinere; for that is the Word made use of in it; and though a Commendam accipere may amount to a Presentation, yet a Commendam retinere cannot. For this Purpose he cited Hob. 143, 156. Besides, he said it is alledged in the present Declaration, that the Church was vacant at the Time of the Commendam granted; and therefore the Commendam must have been

Vide antea
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been absolutely void. With regard to the last Point he said, he could not understand, that the Want of any Averment could be cured by a Verdict, unless such Matter must necessarily have been given in Evidence upon the Trial. The Issue in the present Case singly was, whether the King was seised, or not; the Matter of the King's Presentation was out of the Question, and therefore the want of such Presentation could not be cured by the Verdict. For this Purpose he cited the Case of Dale and Newton, Hil. 10 Anne. there Trespass was brought Quare dun claustra cepit. Issue was joined upon Not guilty, and a Verdict found for the Plaintiff; yet Judgment was arrested, because no Possession was laid in the Plea. And for the like Purpose he cited Skin. 657. Salk. 662. 1 Sid. 184. and 2 Cro. 46. The Chief Justice said he was clearly of the same Opinion, with regard to the two first Points; and inclined likewise to be so with regard to the last, but thought that Matter deserved to be argued again. The rest of the Court clearly agreed with the Chief Justice, with regard to the two first Points; but Judge Lee doubted whether the Verdict did not cure the Defect in the Declaration by the Statute of 16 & 17 Car. 2. accordingly by this Matter stood over; and the Court directed, that this last Point only should be spoke to again. Vide postea.

When an Order of Removal is made upon an Appeal, how far such Order shall be said to be good, or not, in Point of Form.

The King and The Inhabitants of Rippon.

MR. Parker moved, that an Order of Sessions setting aside an Order of two Justices, might be quashed, by Reason that it was only laid upon an Appeal the Court doth order, without saying that the Cause was heard or any Thing more done than barely the Appeal received; however the Court thought this sufficient; accordingly the Motion was refused.

Eleanor Arthur, Executrix of —, against Vanderbank and Smith, Executors of the Countess of Ranelagh.

How far an Action of Covenant will lie against an Executor of the original Lessee, notwithstanding the Lessor has accepted the Rent of the Assignee.

IN Covenant for Non-payment of Rent, the Defendants pleaded that their Testatrix assigned over the Term, and the Plaintiff accepted the Rent from the Hands of the Assignee; on which the Plaintiff demurred. Serjeant Baynes argued for the Plaintiff, and said that after such Acceptance he did agree the Debt could not be maintained against the Defendants; but as the present Action is Covenant, he submitted it, that it would well lie; because the Defendants are sued upon the express Contract of their Testatrix. This Difference between these two Actions he said was well established in the Books; and for this Purpose cited 1 Jones 223. 1 Cro. 188, 580. The Court were intirely of the same Opinion; accordingly gave Judgment for the Plaintiff.

Redhead and Cathgut.

IN Debt on a Charter-Party, the Plaintiff declared on a Deed made in the joint Names of Balckwood and Cathgut, but executed by the Defendant only. To this Declaration the Defendant pleads, that the said Charter-Party was not the Deed of the said Blackwood and the Defendant. Upon which Mr. Filmer moved that this Plea might be set aside as frivolous. Mr. Draper on the other Side said, that this was intended to be a Plea of the General Issue, and therefore, if there were any Mistakes in it, the Court would not set it aside. But he apprehended the Plea was a good one, and for this Purpose cited Matthew's Case 5 Rep. and 2 Lev. 220. where it is held, that if two Persons execute a Deed, and the Seal of one of them is tore off, the Deed is made void as to both. The Court thought the Cases cited plainly differed from the present one, and that the Plea in Question could in no Manner be maintained; accordingly set it aside.

How far the Court will set aside a Plea, by reason of its being frivolous.

Doddridge against Rand and others.

ON Rule to shew Cause, why a Prohibition should not be granted to the Ecclesiastical Court in a Suit against one for Teaching a School without a Licence. Serjeant Eyre said that two Matters are contained in the Suggestion. First, That the Canons in 1603 do not bind the Laity; and secondly, that since the Statute requiring a Licence, the Ecclesiastical Courts have no Jurisdiction. But he apprehended, that the Suggestion in both Parts was wrong; and for this Purpose cited 2 Lev. 222. However the Court made the Rule absolute, and gave the Party to the first Day of next Term to declare.

Vide ante

Davnish and Murtin.

IN Trespass against the Defendant for taking away a Gun, the Plaintiff discontinued his Action on Payment of Costs. And now Serjeant Baynes moved for the Direction of the Court concerning the Taxing them. He said the Defendant was a Justice of the Peace, and took away the Plaintiff's Gun for his killing the Game with it, not having a Qualification. And therefore as the Plaintiff has discontinued his Action, the Defendant was intitled to double Costs by the Statute of 7 Jac. 5. but nothing of this appears upon the Record, that what the Defendant did was in the Execution of his Office; and therefore he moved, that either the Defendant might be at Liberty to suggest this Matter upon the Roll, or else that the Court would give Direction to the Master to allow the Defendant double Costs. Mr. Hayward on the other Side said, he should not defend the Motion at this Time; but in case the Court should

When the Plaintiff has obtained a Rule for Leave to discontinue on Payment of Costs, how far the Court will give Liberty to the Defendant to enter a Suggestion upon the Roll, that he is an Officer of Justice, and intitled to double Costs.

should be of Opinion that a Suggestion on the Roll was proper, he hoped the Court would only make a Rule to shew Cause, in order that the Plaintiff might have an Opportunity to controvert the Fact of the Affidavit, which swore that what the Defendant did was in the Execution of his Office; for in Case the Suggestion should be allowed by the Court, he was afraid it would be too late to controvert it then. Mr. Clark informed the Court that he took the Practice to be not to require a Suggestion, but that the Court should give him Directions, which would justify in allowing double Costs in these Cases. The Chief Justice however inclined to think that a Suggestion was necessary. Judge Lee said too, that the Court was of the same Opinion in the Case of Catherol and Cooper, accordingly the Court made a Rule to shew Cause. Vide postea.

The King and Dr. Earbury.

Vide ante
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What Fees
are due on
filing Affi-
davits.

MR. Josling moved that Mr. Athorp, an Officer of the Court, might answer the Matters of an Affidavit, for taking the Sum of 1 l. 12 s. for filing and copying certain Affidavits of the Defendant, when he was his Clerk in Court, and likewise for taking the Sum of 4 l. 19 s. 4 d. for other Fees. He said that by the Common Law Officers of Justice were paid by the King, and had no Fees at all due to them; for this Purpose he cited Dalton and 2 Inst. 74. He said he had in his hand a Table of Fees made in 1693, where the Fees claimed for filing Affidavits is but 4 d. per Sheet, whereas now the Fees he insisted upon are 8 d. and likewise 8 d. a Sheet for copying; and in Try's Pilazer this Fee for filing is said to be an Innovation, and not paid above four or five Years at that Time; accordingly the Court made a Rule that this Matter might be referred to the Master.

The Bank of England and Morrice.

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Serjeant Chappel came now to shew Cause, why the Replication should not be amended in this Case. He said the Defendant had pleaded the Penalties of Bonds conditioned for the Payment of other Sums, beyond which she had not Assets; the Plaintiffs replied that she had Assets ultra. And now they have obtained a Rule for shewing Cause, why this Replication should not be amended by inserting in it, that these Bonds might be discharged by the Defendant's paying less Sums than those mentioned in the Plea, and that they were kept on Foot per Fraudem. The Serjeant submitted it, that this Amendment would be to make a new Replication. He observed farther, that it is ever since Michaelmas Term was twelvemonth, since the Defendant obtained the Rule for a new Trial, and in all this Time the Plaintiffs never before mentioned this Matter to the Court. Besides, he said, the Defendant has since this Time paid several very large Sums of Money as Executrix to her late Husband; and therefore the Circumstances of her Estate are by no means as

they were at the Time the Plea was pleaded; for which Reason it will be very prejudicial to her, that the Replication should be thus amended, and that her Plea should stand as it did before. Mr. Draper on the same Side cited the Case of Reed and Mallory, Trin. 7 G. 1. There an Action was brought against the Defendant, by the Name of Executor. Motion was made to amend this Declaration by charging the Defendant as Administrator cum testamento annexo; but the Court refused it. He likewise cited Salk. 50. Serjeant Byres on the other Side said that he apprehended the Amendment might be well maintained. He did agree that it was a considerable Time since the Court granted the Rule for the new Trial; but it's being so long was owing to the Defendant's Fault. The Plaintiffs have been all this Time in the Court of Chancery in getting a sufficient Answer from her, in discovering whether these Bonds were not kept on Foot by Fraud; and it is but just now that they have obtained the Discovery. He said they should make no great Objection against the Defendant's amending her Plea; and if that was consented to, he saw no Reason why the Rule should not be made absolute. In the Case of the Dukes of Marlborough and Widmore, Vol. 1. 408. as considerable an Amendment as this was made, and he submitted it in 3 Lev. 368. the Case is full in Point. The Chief Justice said he thought this Amendment would be to make a new Replication; and for that Reason was of Opinion that it ought not to be allowed. He said likewise, that the Defendant's being an Executor, and the Length of Time, were other strong Reasons against it; and as to the Case in 3 Lev. 368. he could not see how it could be allowed for Law but by Consent; and if the Repleader could be in that Case, it might be in every other. Judge Page and Judge Probyn were of the same Opinion. Judge Leo did not say any Thing in this Case, because he was a Party interested; accordingly the Rule was discharged. Vide postea.

Stephens and Stephens.

1 L. 2^d Kel. 160. h. 170.

fil. in equity Error. 220.

THIS was a Case that came out of Chancery for the Opinion of the Court, wherein the Fact was stated in theanner following. Sir William Stephens leased of the Premises in Question, by his Will in Writing, bearing Date the 15th Day of February 1712, devised them to William his Grandson and his Heirs for ever; and in Case the said William should die within the Age of twenty-one Years, then to Thomas his other Grandson and his Heirs for ever. And in Case the said Thomas should die before the Age of twenty-one Years, then to such other Sons of the Body of his Daughter Mary Stephens by his Son in Law Sir Thomas Stephens to be begotten, as should attain the Age of twenty-one Years; the elder of such Sons and the Heirs Male of his Body always to be preferred before the younger of such Sons and the Heirs Male of his Body; and in Default of such Issue Male, then to the Daughters of the said Sir Thomas Stephens on the Body of the said Mary, and the Heirs of the Body of such Daughters, to take respectively as Tenants

What shall be said to be a good executory Devise, or not.

nants in Common, and not as Joint-Tenants; and in Default of such Issue, he devised the same to his Brother Richard Stephens and his Heirs for ever. Then came the following Clause. Item, All the rest and Residue of my real and personal Estate whatsoever and wheresoever, not hereby before bequeathed, I give and bequeath to my said Son Sir Thomas Stephens, to hold the same to him, his Heirs, Executor, Administrators and Assigns for ever. On the 15th of March following Sir William Stephens died, leaving Issue his only Daughter Mary, who had at that Time for Issue only William and Thomas the Devisees mentioned in the Will. On the 18th of May 1713 Susanna the Daughter of the said Mary was born. On the 24th of October 1714 Thomas the Son of the said Mary died without Issue; and on the 14th of September 1718 William the other Devisee died without Issue likewise. On the 14th of March 1719 Mary had Issue a Daughter Mary, who died in 1722. In 1721 another Daughter was born, named Sarah, on the 15th of February 1722 another Daughter Mary was born, who is since dead. And in 1727 Mary had Issue another Son named Thomas. Upon this State of the Case, the Question sent by Lord Chancellor for the Opinion of the Court was, what Estate, Right or Interest, either in present or Contingency, any of the said Parties have in or to the Lands in Question. There were five Parties that put in different Claims to this Estate. Thomas the only surviving Son of the said Sir Thomas and Mary, put in one Claim. Susanna and Sarah put in another. Richard a third. Sir Thomas a fourth. And Dame Mary his Wife a fifth. Mr. Peer Williams appeared as Counsel for Thomas the surviving Son. He said he should admit that Thomas was not to take his Estate till his Age of twenty-one; and possibly he might admit too, that Thomas was only to take an Estate intailed; but yet he submitted it, that a good Estate he was intitled to take, and that by Way of executory Devise. He said the Opinion of the latter Cases has been to allow these executory Interests longer than any Lives in Being. In the Case of Massenburg and Ash, reported in 1 Ver. 234. an executory Devise was allowed to be good, though it might not take Effect till full twenty-one Years beyond any Lives in Being. The Opinion of the Judges of the Common Pleas was taken in that Case before the Chancellor made his Decree, and the Certificate of their Opinion is set forth in hæc verba, in 2 Chanc. Rep. the Quarto Edition 275. For the like Purpose there was the Case of Blew and Marsham, argued before the late Chancellor August 1732. There James Hugh devised his personal Estate to Trustees to the Use of Anne his Daughter for Life, and afterwards to such Children, as she should leave at the Time of her Death, which should attain the Age of twenty-one. The then Solicitor General insisted upon it, that this was too remote a Remainder. The Chancellor took till the next Day to consider of it, and then said, as the Case of Massenburg and Ash was an Authority so strong in Point, he should not go against the Intention of the Will; accordingly decreed for the Children. Mr. Peer Williams observed that the general Rule in all Books is, that such executory Devises are good, provided they are limited to happen within a reasonable Time; and as this Time in the present Case is not to be beyond

pond the Minority of the Children, he conceived it to be a very reasonable one; for this Purpose he cited Co. Lit. 224. where it is held that a Condition restraining an Infant from alienating his Estate is good, and the Intent of the present Devise was to do no more. Serjeant Wright appeared for Susanna and Sarah. He said as the Sons and Daughters of Sir Thomas Stephens were all of equal Degree one to another, and of the same Affinity to the Testator, he submitted it, the Intention of the Testator must be supposed to be to give them all an equal Estate, and he apprehended the Words would well bear it. The Daughters have plainly an Estate in Tail, and he conceived that William and Thomas had no more. To the like Purpose he cited Salk. 237. 6 Mod. 209. 2 Cro. 415. Bridg. 84. 1 Lutw. 810. 1 And. 51. 3 Cro. 525. 2 Lev. 162. and 3 Lev. 125. If this was so, he said Susanna would clearly take by way of contingent Remainder; and upon the Determination of her Estate Sarah would well take by contingent Remainder likewise. He submitted it too, they were respectively intitled to Cross Remainders; and for this Purpose cited 1 Cr. 855. 1 Ver. 224. and Dyer 303. Serjeant Eyres appeared of Counsel for Richard the Brother. He said if the Daughters of Mary and Thomas were intitled to take, he submitted it, that Richard must have a good Title likewise. The whole Estate vested in Susanna upon the Death of William, when the first Mary was born in 1719, the Estate opened and let in her Interest according to Lewis Bowle's Case, 11 Rep. upon the Birth of Sarah the Estate opened again and let in her Interest; when Mary died, he submitted it, Richard was plainly intitled to her Share, and that there was no Pretence of Cross Remainders; for which Purpose he cited 2 Roll. Rep. 281. and the Case of Homes and Meynel, Sir Thomas Jones 172. so that in this way Richard was intitled to one Third of the Estate. When the second Mary was born, the Estate opened again and let in her Interest; so that Susanna, Sarah, and that Mary were each of them intitled to one Third only of that Part of the Estate remaining; and then upon the Death of this said Mary, Richard came into her Share likewise; so that in this way he is intitled to one Third of the Whole, and to one Third of the remaining two Thirds; and upon the Death of Susanna and Sarah without Issue, will be intitled to the Remainder of the whole. And of this very Opinion Lord Chancellor was in a Cause that came before him the 25th of June 1722 in a Bill for the Account of the Profits between these very Parties. Mr. Strange appeared as Counsel for Sir Thomas. He said that he conceived it to be very clear, that not only the Lands not particularly devised away, but likewise every Part of the Estate in the Lands in Question, which does not take Effect according to the Words of the Will are given to Sir Thomas, and the Heir at Law disinherited; for this Purpose he cited Allen 28. Salk. 239. 2 Ven. 285. 3 Mod. 289. and 1 Leon. 251. The principal Question therefore will be, whether any of the intermediate Interests continue. Thomas, he submitted it, had no Title; for though indeed of late Years it has been held that an executory Interest may be good some short Time above any Lives in Being; yet that has never gone any farther than to provide for the Interest of an

Infant in Ventre sa Mere. As to the Case of Massenburg and Ash, the Words of the Certificate of the Judges in the Case are, that the Devise is good; because limited to take Effect within twenty-one Years, and that he said was well consistent with Scatrigood and Edge, Salk. 229. Then as to the Interest of the Daughters, he conceived that there was as clear an Exception to that as there was to the Interest of Thomas, for there is no Pretence that they can take by way of a contingent Remainder; in as much as the two first Devisees had manifestly a conditional Fee. And as this Exception goes to the Interest of the Daughters, it likewise goes to the Interest of Richard. Mr. Filmer appeared as Counsel for Mary; he submitted it, that as far as these Interests devised could not take Effect, they were to be considered as lapsed, and fell to the Heir at Law. For this Purpose he cited the Case of Wright and Wall, Mich. 1725, in the Common Pleas. There a Man devised all his Estate to Carter and his Heirs, the rest and Residue to another; Carter died in the Life of the Testator, and the Court were of Opinion that this Estate belonged to the Heir at Law. To the same Purpose was the Case of Goodright and Opey, Pasch. 5 Geo. 1. though there the Court gave no Judgment by Reason the Party died. The Chief Justice said that the Case of Massenburg and Ash was that of a Trust of a Term, and he was not satisfied, but that the Court of Chancery had gone farther in allowing Limitations in those Cases, than the Courts of Common Law have in executory Devises. The Court said that this Matter was proper to be argued again; accordingly it stood over. Vide postea.

The King *against* Corbet Kynaston and others.

How far the Court will grant an Information, or not, for a Disturbance relating to an Election of a Member of Parliament.

ON Rule to shew Cause why an Information should not be granted against the Defendants, the Case appeared to be chiefly to this Purpose. Last Summer there was a Horse-Race at Shrewsbury, at which was present Mr. William Kynaston Recorder of the Town, who stood Candidate for the next Election. Mr. Corbet Kynaston one of the Defendants was likewise there, who stood Candidate on the opposite Interest. Mr. William Kynaston was sitting in a Booth on the Race-Ground; upon which Mr. Corbet Kynaston came with his Party up to him, made a great Mob, and cried Liberty and Property, no Excise, down with Heavy Billey. Mr. William Kynaston was plainly meant by that Description; and then they struck one or two of his Servants over the Head. Upon this State of the Case the Court were of Opinion that no Information ought to go, principally, by Reason that this Affray happened at a Race-Ground; though the Chief Justice expressly declared his Opinion to be, that if such Affray had happened either in the Disturbance of publick Justice, or at an Election of Members of Parliament, the Court would have granted an Information on that Account; however, in the present Case the Rule was discharged.

The King *and* De Veil.

ON Rule to shew Cause why an Information should not go against the Defendant, the Complaint against him appeared to be shortly thus. Five Boys had been committed by him for a Theft; the Goods stolen were carried to a Pawn-Brokers; upon which M^r. De Veil sent to the Pawn-Broker's requiring him to bring the Goods to him, in order that he might have them forth-coming at the Trial. The Goods accordingly were brought; produced by M^r. De Veil at the Trial, and the Boys convicted. When the Conviction was over, the Party robbed applied to M^r. De Veil for the Goods; but M^r. De Veil told him the Keeper of Bridewell, whose Custody the Boys were committed to, had been with him and informed him, that he had been at a good deal of Expence in keeping the Boys in Prison and attending with them at the Trial, which came to 4s. per Boy; upon which M^r. De Veil told the Party that he must pay this Money to the Keeper, and that he should not deliver the Goods to him, till he had paid it. The Money accordingly was paid; but afterwards 8s. of it was returned. Upon this State of the Case the Court made the Rule absolute, and said that they thought the requiring the Goods to be brought, and the Money paid, were both illegal.

How far the Court will grant an Information against a Justice of Peace.

The King *and* The Commissioners of Sewers in Lincolnshire.

MR. Abney came to shew Cause, why a Certiorari should not go to remove up certain Orders made by the Defendants, and produced an Affidavit, that the Place which the Orders related to, was not repaired, but continued a great Nuisance to the Inhabitants of the Town. But the Court was of Opinion, that this Affidavit was not sufficient, by Reason it was not sworn in it, that this Place was a Nuisance to the Country in general. Accordingly (Chief Justice absent) the Rule was made absolute.

When a Certiorari is applied for, in order to remove up certain Orders of Sewers, and an Affidavit is produced that the Place in

Question is not repaired, how far such Affidavit shall not be said to be certain enough.

Hooker *and* Hooker.

THERE being a new Chief Justice made since the last Argument, this Case came now on to be argued again. Serjeant Belfield was of Counsel for the Plaintiff, and in Support of his Argument relied upon the Case of Harpole and Kent, reported in Sir Thomas Jones 76, and 9 Ven. 306. M^r. Fazakerly was Counsel on the other Side, and submitted it in the first place, that the Contingent Remainders were not destroyed by the coming of the Fee to William Hooker the Younger. He said,

Vide antea 232.

it

it could not be supposed, but William Hooker the Elder had it in his Thoughts at the Time the Settlement was made, that William Hooker the Younger his eldest Son would be his Heir; and therefore it could not be supposed that the Intent of the Parties was, that the coming of the Fee to William Hooker the Younger, on the Death of his Father, should destroy the whole Intent of the Conveyance. In Lewis Bowle's Case therefore the Judges allowed, that there should be an Opening of the two consolidated Estates in order to let in the intermediate Remainder; and he conceived it was reasonable that the same Construction should be made in the present Case. To the like Purpose he cited 2 Rep. 61. and Raym. 28. He said if this was so, that these Estates were always subject to open, in order to let in these intermediate Interests, he submitted it, that William Hooker the Younger could not be said to be seised of such a perfect Fee, as is necessary in order to give his Wife Title of Dower. His Children likewise could never take by Descent from him, and for that Reason likewise the Widow could not have Dower according to Co. Lit. 40. The Chief Justice said that he was of Opinion even with regard to the first Point, that the Contingency was destroyed. He did agree, that where the two Estates vest in the Party at one and the same Time by one and the same Conveyance, there shall be an Opening in order to let in the intermediate Interests; but in the Case of Harpole and Kent, it is held, that where the second Estate comes at a different Time from the first, even by Descent, the intermediate Interest is destroyed. In the present Case indeed there was no Descent of the Fee, because it was in Abeyance during the Life of William Hooker the Elder; then the Estates came to be consolidated, and therefore he thought the contingent Interest was destroyed in this Case likewise. But supposing this Point not to be so, yet still he thought the Plaintiff had a good Title to Dower, in as much as it is stated, that William Hooker the Younger, never had any Issue. The single Case in the Books that he knew of against this, was that in 3 Cro. 316. But in the Case of Purefoy and Rogers, 2 Saund. Lord Chief Justice Holt, who was then Counsel, said that Lewis Bowle's Case and others in the Books were against it, and that it was not Law. And in Eschment brought in Lord Bridgeman's Case that Case in Cro. was denied by him likewise to be Law; and accordingly the Chief Justice said he did not take it to be so. Judge Probyn and Judge Lee declared themselves to be of the same Opinion with the Chief Justice in both Points. Judge Page declared himself to be of the same Opinion as to the second Point, but spoke nothing as to the first: Accordingly the Court said they should send a Certificate to this Effect to the Chancellor.

Hore and Gates.

THIS Matter coming now on again, Serjeant Wright argued Vide antea 196. for the Plaintiff, he said he should not contend but the Defendant might possibly take Advantage of that Matter upon Motion, which he has insisted upon in his Rejoinder; but submitted it, that in pleading he could not. For this Purpose he cited the Case of Jones and Burnet, East. 5 Geo. 2. in the Common Pleas. There Assumpsit was brought by the Plaintiff, as Indorsee of a Note, by Attachment of Privilege. The Defendant pleaded, that though the Attachment of Privilege bore Teste the 12th of February, being the last Day of Hil. Term, yet in Fact it was not sued out till the 25th of March, and the Indorsement was not made before that Day. To this Plea there was a Demurrer, and the Court held it to be bad. To the like Purpose he cited the Case of The King and Man, in the Court of Erchequer. There the Defendant claimed Title to Goods, which were taken upon an Extent, Tested the last Day of Trinity Term, 7 Geo. 1. and made out by Mr. Baron Price, the Fifth of October following, the Defendant demanded Oyer of this Extent, and set this Matter out by his Plea, in order to shew that this Extent was bad. The Court was of Opinion, that the Fault could not be taken Advantage of by Plea, but was proper to come on by Motion; which accordingly it did; and then the Court was of Opinion it was bad. To the like Purpose he cited the Case of Fuller and Jossling, Vol. 1. 404. and farther cited Co. Lit. 117. Carthw. 70. and 2 Salk. 700. He observed too, that the Counsel of the other Side had agreed upon the former Argument, that no such Averment would be made in the Case of an Original; but would have distinguished this Case from that, by Reason that in a Bill of Middlesex there is no Teste. For his Part he said he could see no Difference; because it is certain, that though such Writ is not taken out but by Application of the Party, yet in Judgment of Law the Court orders it to Issue, which can be done only in Term-Time. Mr. Dennison argued on the other Side, and said he should not contend but in many Respects the Suing out this Bill related to the Term precedent; but this is only a Fiction, and nothing is more certain, than that a Fiction shall work no Wrong. In the present Case, he said the Plaintiff's Right was extinguished by the Statute of Limitations, and if the present Fiction should prevail, the Plaintiff's Right would revive manifestly to the Injury of the Defendant: and for this Purpose he cited 2 Keb. 198. 3 Keb. 213. 1 Ven. 362. and Raym. 161. The Chief Justice and Judge Probyn inclined to be of Opinion for the Plaintiff. They did agree that a Fiction should do no Wrong; but did not think that if this Fiction should prevail in the present Case, there would be any to the Defendant. The Law-makers they said must be supposed to have understood the Law and the Course of the Court, which is Part of it; and therefore they doubted whether the Legislature intended that the Plaintiff should be barred of his Cause of Action, till the End of the Vacation after the six

Pears was over. Judge Page and Judge Lee were of a contrary Opinion, and thought that the Intent of the Legislature must be to require the Plaintiff to put in his Demand within the six Pears, and not to allow him to do it in the Vacation after. Accordingly this Matter stood over. *Vide postea.*

Crompton and Den.

Vide antea
189.

THIS Matter coming now on again, the Court declared themselves to be of Opinion, that the Defendant ought to have given Notice to the Indorsee of his Intent of applying to be discharged, though the Indorsee did not give him Notice of the Indorsement. The Reason for their Opinion was, that before such Notice by the Indorsee he was certainly a Creditor; and the Chief Justice said in case a Creditor dies, leaving an Executor, it might be difficult for the Prisoner to give him Notice, but undoubtedly he must do so before he can be discharged. Accordingly the Court gave Judgment for the Plaintiff.

Bracey and Dawson.

Vide antea
341.

THIS Matter coming on again, Mr. Strange argued for the Plaintiff. He said he took it to be a clear Case, were it not for the Doubt arising for the King being concerned in Interest, that the Plaintiffs had a good Title to the Goods. For this Purpose he mentioned the Statute of 21 Jac. 16. Salk. 111. and 3 Lev. 69. And as to that Doubt arising from the King's being concerned in Interest, he apprehended, as this Case was, it made no Difference. The Statute, which this Question turns upon, is 3 Geo. 2. 25. and by that Statute he did apprehend, that the Money assessed upon the Division was not to be considered the King's Money, whilst in the Hands of the Collector, but only after it comes into the Hands of the Receiver General. The Collector is only considered, as the Servant to the respective Persons charged in the Division to pay their Money over to the Receiver, and is appointed by them; the Receiver General is considered as Servant to the King to pay the Money over to the Exchequer. He did however agree, that an Extent would have reached this Money in the Hands of the Collector, and that from the Time of the Tasse of it; but submitted it, that the Warrant in the present Case could not have such an Effect; that this Warrant was no Matter of Record; and therefore the Goods of the Collector were not bound by it, till the Time the Warrant was executed upon them. Mr. Moreton argued on the other Side, and even in regard to the first Point submitted it to be not so clear; for which Purpose he cited 1 Ven. 316. and 1 Cro. 109. With regard to the second, he said he did agree that the Division have a Power of appointing two Assessors, one of which the Collector shall be; but the Commissioners have the Power of nominating which of the Assessors shall be the Person; and therefore he submitted it,

it, when the Money is paid into the Collector's Hands, it is considered as the Money of the King. If this was so, he did not see but the Goods must be bound from the Tasse of the Warrant equally as in the Case of an Extent, and that this Warrant no otherwise differed from an Extent, than that it is a more expeditious Remedy. The Court said, they would consider of this Case among themselves, and then deliver their Opinions. Vide postea. *But the case is not mentioned again.*

However the judgment of the Court is implied in the following.
5. 1. 1. in the Strange v. Rep. B. R. Long. Hardwicke.

The King and Mitter.

THIS was a Conviction for killing a Deer belonging to Waltham Forest, taken before John Barber, Esq; and Sir William Thomson, Justices of the Peace for the City of London, and founded upon the Statute 3 & 4 W. 3. c. 10. In this Conviction the Evidence was set forth, that Joseph Chetwyn of Barking in the County of Essex made Oath before the said Justices, that in the Defendant committed the said Offence in Barking aforesaid, for which he was apprehended in the City of London. Thereupon the Defendant appeared upon due Summons, and being heard what he could say in his Defence, the Justices convicted him, and gave Judgment, that he should forfeit 30 l. one Third of the Penalty to the King, another Third to John Battey the Informer, and the remaining Third to the Poor of the Parish of Barking. Mr. Strange moved, that this Conviction might be quashed, and that for three Exceptions. First, That the Witness appears to be interested in this Matter. For it is stated in the Conviction, that he belonged to the Parish of Barking, and the Penalty is given to the Poor of that Parish. The second Exception was, that it did not sufficiently appear that the Defendant was apprehended in the Place which the Justices belonged to. He did agree, that either the Justices belonging to the Place where the Offence was committed, or the Justices belonging to the Place where the Party is apprehended, had Jurisdiction in this; and he did farther agree, that in setting forth the Evidence it was alledged, that the Defendant was apprehended in the Place where the Justices belonged to; but it does not appear, that that Allegation came from the Witness, it might as well have come from the Justices themselves. For this Purpose he cited the Case of The King and Johnson, Hil. 6 Geo. 1. that was a Conviction for keeping a Gun. An Exception taken to it, that the Offence did not sufficiently appear to have been committed in the Place where the Justices belonged to. In that Conviction the two Justices of the Peace were for Middlesex, and it no otherwise appeared, that the Offence was committed within their Jurisdiction, than in the Judgment given by the Justices. The Judgment there given was, that he should forfeit a certain Penalty to the Poor of the Parish of Chelsea, infra quam the Offence was committed, and upon this Exception that Conviction was quashed. The third Exception was, that the Style of the Justices was not sufficiently set out; for they were only set forth to be Justices of the Peace, and to hear and determine divers Trespasses and Felonies;

How far a
Conviction
for Deer-
stealing shall
be said to be
good in point
of Form.

nies; and it was not said that they were Assigned for that Purpose. Mr. Fazakerly argued on the other Side; with Regard to the first Exception, he did agree that if the Penalty had been given to the Overseers of the Poor of the Parish, there might have been some Weight in it; for then this Penalty would have been for the Benefit of the Rich as well as the Poor; but here it is given merely by way of Bounty to the Poor, and the rest of the Inhabitants can have no Benefit by it. In answer to the second Exception, he said this Matter was set forth upon the Evidence itself, and therefore it must be taken to have been what the Witness swore. As to the last Exception, he submitted it, that it was not necessary that any Thing more should have been set out, than that the Justices were Justices of the Peace; for then they would have followed the Words of the Act of Parliament, which is as much as is necessary to have been done in these Cases. He observed farther, that in the Style of this Conviction it was set forth that the Justices of Peace were assigned to hear Trespasses and Felonies, and therefore this Matter was not necessary to be again repeated. The Court was of Opinion that the Exceptions were fully answered; accordingly the Conviction was confirmed.

Cock and Vivian.

Vile antea
243.

THIS Matter coming on again, Mr. Hussey and Mr. Robinson stated their Exceptions in Arrest of Judgment. They said they apprehended the Law to be clear, that Toll is due from the Buyer and not from the Seller, unless a Prescription warrants it; for this Purpose he cited 2 Inst. 220. A Prescription they took to be necessary, and that a Custom would not be sufficient. For this Reason though the laying this Toll to be due secundum consuetudinem might be good, if a Custom would be sufficient; yet as they apprehended a Prescription was necessary, they submitted it, that the alledging this Toll to be due secundum consuetudinem, would not be good, though after a Verdict. But supposing Toll was due from the Defendant in this Case, yet they apprehended an Indebitatus Assumpsit would not lie for it; for this Purpose he cited 2 Roll. Abr. 553. Lutw. 1336. at least they conceived that a Quantum Meruit could not possibly be maintained. This Objection, though only taken to the Form of the last Count, they said, would go to the Substance of the whole Declaration. Upon a Demurrer they agreed this would not be so; for there, if any of the Counts are good, the Court will give Judgment for the Plaintiff; but where a general Verdict is given, one defective Count viciates the whole. Serjeant Chappel argued on the other Side, and said he did agree that without a Prescription Toll could not be due from the Sellers, who were the Defendants; but after a Verdict, he submitted it, that the Alledging it to be due secundum consuetudinem would make it good; with Regard to the second Point, he conceived that an Indebitatus Assumpsit would well lie; and for this Purpose he cited 2 Lev. 174. 3 Lev. 262. Ven. 298. 3 Keb. 177. 1 Show. 35. 3 Mod. 239. As to the last Point

Point, he said that Pickage and Stallage were considered of several Species of Tolls; to which Purpose he cited Lutw. 1580, and the Place before mentioned in 2 Inst. He observed likewise, that it was expressly alledged in the First of the Counts, that Pickage and Stallage were due to the Plaintiff; so that these Duties might well be included in the last Count, under the Word Tolnetum. Pickage and Stallage, he said, were uncertain Duties; though Toll in the common Sense of the Word might not, and he apprehended there could be no Sort of Doubt, but a Quantum meruit would lie for those Sort of Duties. The Chief Justice said that he did think the second Objection was answered; but he had some Doubt in Regard to the first, and a greater Doubt in Regard to the last. He said he did agree that Pickage and Stallage might sometimes possibly be included in the Word Toll; but certainly the Word Toll is capable of a different Sense, so as not to include them. By the first Count likewise, the Plaintiff hath himself distinguished them, and laid Claim to those different Duties by Name; and in the last he has plainly confined himself to this one particular Sort, according to the common Sense of it; and therefore he conceived that it could in no way be intended to signify the other. The rest of the Court were of Opinion that this last Exception was the most material; and upon that in particular thought this Matter deserved farther Consideration. But in Hill. 8 Geo. 2. the Rule for staying the Judgment was discharged by Consent.

Pathow and King.

IN a Writ of Error on a Judgment given in the Common Pleas in Debt on an Award, the Question arose on the Validity of the Award, on Nul tiel Award pleaded. It seemed there had been a Dispute between the Plaintiff and Defendant upon an Execution taken by the Defendant of the Goods of Nathaniel Bacon, and before this Execution was made, the Plaintiff took some of these Goods to himself, and sold them; but then Execution was made of the whole. This Dispute was referred to the Arbitration of Richard Barclay; and he awarded that the Defendant should pay to the Plaintiff 455 l. by the 24th of June, that the Defendant should keep all these Goods which he had taken in Execution, except those which the Plaintiff had taken to himself and sold before the Execution was made; and that thereupon general Releases should be given on both Sides. Mr. Draper submitted it, that this Award was void, by Reason that it was wholly uncertain what Goods the Plaintiff had so taken to himself and sold; for which Purpose he cited 3 Mod. 272. Mr. Strange argued on the other Side, and said that it might easily be ascertained upon Inquiry, what Goods the Plaintiff had taken and sold at the Time; but if this Part of the Award should be void for the Uncertainty, yet still he submitted it, that the Award could not be said to be made for the Benefit of one of the Parties only, and so void in the whole by Reason that mutual Releases are awarded to be given. The

How far an Award shall be said to be certain enough.

Court inclined to be of Opinion, that this Part of the Award was void for the Exception that had been taken; and this Part of the Award being void, would make the whole so, by Reason that these Releases are not to be executed, but upon the Terms precedent; so that then there is nothing awarded for the Benefit of the Defendant; however, this Matter stood over.

Kent and May against Kent.

Vide antea
337.

THIS Matter coming on again, the single Doubt for the Consideration of the Court arose upon the two Sums given for Damages and Costs, by Reason of the Delay of Execution by the Writ of Error, that they were not charged upon one of the Plaintiffs in the Writ of Error, as well as the other. Serjeant Chappel submitted it, that for this Reason the Judgment of Affirmance in the King's Bench in Ireland ought to be reversed. He said he doubted whether this Question would depend upon 3 Hen. 7. 10. by Reason that in 1 Sid. 157. it is held that this Statute does not extend to Ireland; but he presumed that there was a like Statute made in Ireland with that of 16 & 17 Car. 2. 8. and he thought the Question would depend on this Statute, rather than the other. He said he did agree that he could not produce any express Authorities, to shew that both the Plaintiffs in Error ought to have the Burden of the Costs and Damages equally, but submitted it, that the Reason of the Thing shewed that it must be so. Serjeant Eyres argued on the other Side; he conceived that the whole of this Question must depend on 3 H. 7. 10. and thought that the Case in Sid. was a very strange one, by Reason that this Statute was made seven Years before Poyning's Law, and by that Law all Statutes then in Force in England, were made to be in Force in Ireland. Then with Regard to that Statute, he conceived the present Case was not within it; by Reason that the Ancestor of one of the Plaintiffs lived for some Time after the Judgment given; and it would be an unreasonable Thing that his Heir at Law should answer for the Damages, by Reason of the Delay of Execution in his Time. Some Cases have been expressly adjudged to be out of the Reason of that Act, and particularly he cited 1 Mod. 77. 3 Lev. 75. 1 Ven. 88. and 166. But supposing this Part of the Judgment should be bad, yet still he conceived that this Court would give the same Judgment as that Court ought to have given; and for this Purpose he cited 1 Cro. 401, 442, 511. The Court said they would consider of this Matter; so ordered it to stand over. Vide postea.

Falhers and Corbret.

How far an
Indebitatus
Assumpsit
will lie for
Rept.

IN a Writ of Error in a Judgment in the Common Pleas, in an Indebitatus Assumpsit, it appeared that the Plaintiff below had declared, that whereas he was possessed of a House in Newgate-Market, in Consideration that he would permit the Defendant,

dant, being a Butcher, to have the Use of the Passage in it for hanging up his Meat, he would pay him at the Rate of 30 s. per Year for the same; the Plaintiff averred that he did let the Defendant have the Use of this Passage for a Year and Half, by Reason of which there was the Sum of 2 l. 5 s. due to him. Issue was joined on Non Assumpsit, and a Verdict found for the Plaintiff. Mr. Strange submitted it, that Debt for Rent ought to have been brought, and that an Indebitatus Assumpsit would not lie. Mr. Parker on the other Side said that he conceived that this was not a Rent, by Reason that no Part of the House was let, but merely the Use of the Passage agreed for; he conceived therefore, that Debt for Rent would not lie. He observed farther, that this Agreement being to pay after the Rate of such a Sum, was another Reason why such Action could not be maintained. And for this Purpose he cited 4 Mod. 78. But tho' such Action would have lain, yet upon an express Promise, an Indebitatus Assumpsit will lie likewise; and for this Purpose cited Hardres 366. The Court was of the same Opinion; accordingly affirmed the Judgment.

Starcy and Gardiner.

IN a Writ of Error on a Judgment in the Common Pleas in an Action of Trespass, it appeared that the Plaintiff had declared against the Defendant for breaking his Close, and taking divers Sorts of Cattle. As to the taking of Part of the Cattle, the Defendant pleaded Not Guilty; as to the rest of the Declaration, he justified on a Distress for Rent. Two Issues were taken by the Plaintiff on these two different Parts of the Plea; but at the Trial no Evidence was given on the Issue of Not Guilty; accordingly the Jury omitted to find any Thing as to that; but gave their Verdict singly upon the other Issue; and as to that found a Verdict for the Plaintiff; and Judgment was given for him accordingly. It was objected on the Part of the Defendant that this Verdict was not sufficient, in as much as it had found nothing with Regard to one of the Issues. The Counsel on the other Side submitted it; that if this Issue which the Jury have found nothing to, had been singly upon the Vi & Armis, the Verdict would have been good; for this Purpose they mentioned the Case of Stradford and Neal in this Court, which was founded upon a Case in Saunders. The Court agreed that Case, because the Vi & Armis was merely Matter of Form, but thought that Case was distinguishable from the present one; however this Matter stood over.

How far a Verdict shall be said to be sufficient, or not.

Spencer and The Manucaptors of Donelly.

How far the Court will give Leave that a Vacatur shall be entered upon a Record.

ON Motion for the Master's Report, the Fact came out to be in this Manner. In the Bail-piece the Defendants had acknowledged themselves to be Bail for John Donelly, Gent. but in the Recognizance they were entered to be Bail for John Donelly, Esq. A Scire facias had been brought upon this Recognizance, to which the Defendants pleaded Nul tiel Record. The Record coming before the Master to be verified, this Recognizance was produced, and he entered a Protulit recordum. Motion had been made, that the Entry of this Protulit might be vacated, and that the Recognizance might be made agreeable to the Bail-piece; the Court thought this to be reasonable; accordingly the Rule was made so.

Wells and Kitchenham.

How far a Writ of Execution shall be said to be amendable, or not, in respect of the Teste of it.

ON Rule to shew Cause, why a Fieri facias should not be quashed for its being Tested Philip, Lord York, whereas it should have been Tested Philip, Lord Hardwick; Mr. Draper submitted it in the first place, that the Teste of a Writ was not Essential to it, but the Sealing it, and for this Purpose mentioned the Instance of a Bill of Middlesex. But in the next place he conceived, that this Defect was amendable; and said that he had an Affidavit from the Plaintiff's Attorney's Clerk, that this Writ was made out not above two Days after the Chief Justice was made a Peer, that he filled up this Teste himself, and that it was a meer Mistake of his own. He observed farther, that this was a Judgment the first Day of Mich. Term last, that there had been one Fieri facias taken out before this, tested the last Day of that Term, and returnable the first Return of this, that the Sheriff had fail'd to make any Return to that, and that thereupon this Alias was sued out; and to verify this he produced the Record in Court. He said he conceived, that the Court had allowed as strong Amendments to be made in judicial Writs, as this that was contended for in the present Case. For this Purpose he mentioned the Case of Hews and Alvares, which came before the Court Mich. 12 Geo. 1. that was an Action upon the Case on two several Promises; Judgment by Default, and a Writ of Inquiry brought. By this Writ the Jury were ordered to inquire what Damages the Plaintiff had suffered Occasione præmissorum; when this Writ of Inquiry came to be executed, the Plaintiff gave in Evidence only the first Promise. And upon that Motion was made that this Writ of Inquiry might be amended, by inserting in it the Words Occasione primæ Promissionis instead of the Words Occasione Præmissorum. To support this Amendment was cited 2 Cro. 172. Baker and Camble, East. 11 Ann. The Counsel on the other Side cited there 1 Cro. 147. 2 Bulst. 35. 1 Roll's Abr. 201. Mod. Cases 263. Sal. 52 and 45. the Court there took Time to consider of that Case till the next

next Term; and then ordered the Amendment to be made. *Mr.* Draper farther cited the Case of Knightly and Coston 1 Nat. Brev. 122. and farther relied upon Rep. 8. Blackmore's Case, 3 Cro. 203, 383. and Sir Thomas Jones 41. *Mr.* Strange was Counsel on the other Side; but desired Time to look into these Cases; accordingly the Rule was enlarged. Vide postea.

Desbordes and Horsey.

ON Rule to shew Cause, why a Capias ad Satisfaciendum should not be quashed, *Mr.* Strange said, that two Objections had been made to it; first, that it was returnable on a Day impossible; secondly, that it was taken out after the Allowance of a Writ of Error. As to the first Objection, he said that the Plaintiff had taken out another Capias, which was returned and filed. With regard to the second he did agree, that the first Capias was taken out after a Writ of Error allowed; but said that the Plaintiff in Error had not given Bail to it according to the Statute of 3 Jac. c. 8. and as this Case was, submitted it, that Bail was requisite. It was an Action brought upon a Bond with Condition, that the Defendant should pay to the Plaintiff the Sum of 500 l. with Interest at 5 per Cent. being the same Sum as is mentioned in a Deceasance bearing Date the same Day with the Bond. He did agree, that if the Condition of this Bond had been for the Performance of any Collateral Covenants, Bail would have not been requisite; but he submitted it, that this Bond was only for the Payment for a Sum certain, though said to be the same Sum as is mentioned in another Instrument. In the Case of a Bottomry Bond he remembered that the Court was of Opinion three or four Years ago, that such Bail was requisite; because when the Event happens, the Bond is quite certain. So in the Case of a Promissory Note, which was Value received for Meat and Drink, he remembered it was held to be negotiable. *Mr.* Taylor on the other Side said, that he submitted it, no Bail was requisite by Reason that the Condition of the Bond referred to another Instrument. And as to the Case said to be determined three or four Years ago, for his own Part he knew of no such, and Show. 14. is against it. Then with regard to what was said, that another Capias with a good Return was taken out, he observed that that could be no Reason why the present one should not be quashed. The Court was of Opinion, that as this Case was, Bail was necessary to be given, before the Writ of Error could be a Superseas; but for the Reason last mentioned made the Rule absolute.

How far a Writ of Error shall not be a Superseas till Bail is given to it.

Law and Law.

How far the Court will give Liberty that a Plea may be withdrawn.

IN Debt on Bond, M^r. Fazakerly moved to withdraw a Plea of Solvit ad Diem, and plead another special one on 5 & 6 Ed. 6. 16. that the Bond was illegal, being made on the Sale of a certain Office. The Court at first doubted whether this could be done; because the Defendant did not offer to plead the General Issue, but a Special Plea. Upon which M^r. Fazakerly mentioned the Case of Meard and Philips, Trin 5 Geo. 2. where the Court gave the Defendant Leave to withdraw the Plea of Nil debet, and plead two Special ones. Upon this the Court made a Rule to shew Cause in the present Case. Vide postea.

The King against Sir Watkins William Wynn and others.

How far a Charter of a Corporation shall be said to be illegal.

ON Rule to shew Cause why an Information should not be granted against the Mayor, Aldermen and Common Council of the City of Chester, to shew by what Authority they claimed to elect Aldermen, exclusive of the Freemen at Large; and likewise on four other Rules to shew Cause, why an Information should not be granted against the Mayor and three of the Aldermen of Chester for exercising the said Offices; the Nature of the Case appeared to be in the Manner following. By a Charter made in 16 Car. 2. Power was given to the Freemen at Large of joining with the Aldermen and Common Council in the Elections of Aldermen in this City. This Charter was made under till the 36th Year of that King, and then on a Quo Warranto brought against this Corporation, Judgment was given, that all their Liberties should be seized and the Corporation dissolved. The Year following a new Charter was granted to them vesting this Right of Election in the Aldermen and Common Council, exclusive of the Freemen at Large, and the King thereby reserved to himself a Power of removing them at Pleasure. The Freemen however made some Opposition to the Acceptance of this Charter. In the Beginning of King James II's Time the Judgment of Seizure was pardoned, and they had a full Restitution of their Liberties. In the 4th of James II. there was another Charter granted to them, vesting this Right of Election in the Aldermen and Common Council only, and in the Charter the King reserved to himself a Power not only of removing them at Pleasure, but of appointing new ones in their Room. There was some Opposition made by the Freemen to this Charter likewise; which continued to the Year 1698, but from that Time they intirely acquiesced under the Election made by the others. Upon this State of the Case M^r. Strange and others of Counsel for the Defendants, submitted it, that the Rule ought to be discharged. They said they did agree, that neither the Charter of 37 Car. 2. nor that of 4 Jac. 2. could bind the Freemen, unless the Freemen accepted it; but they submitted it, that a long Acquiescence would be an

Est.

Evidence of such Acceptance. An Acquiescence there was in the present Case for 35 Years last past; and they apprehended that the Court would not grant an Information now, which would overturn the whole State of the Corporation. In the Case of Taunton an Information was moved for against certain Members of the Corporation for not having taken the solemn League and Covenant in Pursuance of a Clause in an Act of Parliament. It was argued by the Defendant's Counsel in that Case, that if such Information should be granted on that Account, it would affect the Election of most of the Officers in England. That Argument had a considerable Influence with the Court. The Rule for shewing Cause was never made absolute, and whilst it was depending the Clause in the Act of Parliament was repealed. For the like Purpose they cited the Case in Skin. 574. Mr. Abney and others were of Counsel on the Side of the Rule. They conceived that the Judgment of Seizure in 36 Car. 2. was intirely illegal. If the Corporation had forfeited their Charter, the only Method of taking Advantage of the Forfeiture was by Scire facias to repeal it; and no such Judgment can be in Quo Warranto. For this Purpose they mentioned the Case in 4 Mod. 52. But if the Judgment had been legal, the Restitution in Jac. 2. had intirely taken off the Force of it. Then with regard to the Powers reserved to the Crown by the Charters of 37 Car. 2. and 4 Jac. 2. they said they were of a very extraordinary Nature, and such as made the Charters to be void and not capable of being accepted. But they submitted it, in Fact there was no Acceptance; on the contrary there was an express Opposition, and the Submission to it for 35 Years last past they conceived would not amount to an Acceptance. For this Purpose Mr. Hollins mentioned the Case of the Corporation of Beudley, where the Court were expressly of Opinion that 22 Years would not. The Chief Justice declared his Opinion to be, that the Judgment of Seizure was not according to Law; and with regard to the two last Charters he observed, that the Powers reserved in them could hardly be warranted; and he never new these Sort of Charters in King Charles the 2d's and King James the 2d's Time mentioned by the Judges, but with Censure. By the Charter of 16 Car. 2. the Freemen at Large had undoubtedly a Right in joining in these Elections. And he did not think that the Acquiescence to the contrary by the Freemen for 35 Years together would make any Difference. In the Case of Brecknock there was a Charter granted in the Reign of Philip and Mary, which settled the Election in one way; from 15 Eliz. there had been an unvariable Usage in another. This Matter was found by special Verdict. Yet this Court was of Opinion, that the Usage ought not to prevail; accordingly gave Judgment in the Quo Warranto against the Defendants. On that Judgment a Writ of Error was brought in the House of Lords, and that Judgment affirmed. The least Thing that the Court could do in this Case was to permit this Matter to be tried. The rest of the Court were of the same Opinion; accordingly the Rule was made absolute. Vide postea.

Reed

Reed and Doltery.

How far a
Prohibition
shall go to
the Ecclesi-
astical Court,
in a Suit re-
lating to
Tithes.

ON Rule to shew Cause why a Prohibition to the Ecclesiastical Court should not be granted, the Case appeared to be in this Manner; The Plaintiff libelled for Tithes of Agistment of Cattle, as Curate and Sequestrator of the Parish of Bishop-Wilton in the County of York, and in his Libel set forth, that by Donation, Endowment, Custom, and Prescription Tithes, real and personal, were due to the Vicar of this Parish, his Curate and Sequestrator; and likewise he libelled for an Offering of 7 Pence per Year. The Defendant by his Plea denied that Tithes were due to the Plaintiff in the Manner set forth in his Libel, or in any other Manner whatsoever; and likewise denied his Right to the Offering. This Cause was heard before the Ecclesiastical Judge, and he decreed for the Plaintiff. Dr. Lee came now to shew Cause on this Rule. He said he did agree that if the Plaintiff had founded his Right to Tithes singly upon the Custom, as the Defendant has denied this Custom, a Prohibition would lie; but in Fact the Defendant has founded his Right upon the Endowment, and the Custom is only laid by way of Usage in Pursuance of it. The Endowment was by Nicholas de Ros, and he endowed the Vicar and his Successors with Altaragium & Decimam crostorum infra clausuras. The Word Altaragium, he said, primarily signified such Things only as were immediately for the Service of the Altar; but the Sense of this Word has been extended much farther, and to signify almost all Sorts of Tithes whatever. Of this Opinion the Court of Exchequer was, Mich. 21 Eliz. and this Case is to be seen in the Remembrancer's Office. But if there was any Doubt whether this Word would convey the Right of Tithes to the Vicar; yet certainly the other Words would, namely, the Decimam Crostorum. He observed likewise, that by another Clause in this Endowment the Right of Offerings was expressly given; for there are these Words in it, Principales & omnes alias oblationes. And if there had not, he conceived that the Ecclesiastical Court might hold Plea for Offerings, even though the Custom was denied; for this Purpose he relied upon a Clause in 2 Ed. 6. 13. But especially he submitted it, that there was no Foundation to grant this Prohibition after Sentence; and for this Purpose he mentioned 1 Cro. 595. 2 Keb. 612. and Noy 70. Mr. Bootle argued on the same Side, and said he did agree that this Suit was between an Ecclesiastick and a Layman; but the Right that came in Question in this Case was between two Ecclesiasticks; the Doubt arising, whether the Rector was intitled to these Tithes or the Vicar. In these Cases he said he conceived that the Ecclesiastical Court might well hold Plea of a Custom; and for this Purpose he mentioned 2 Roll. Ab. 310, 311. 2 Roll. Rep. 55. Gouldf. 149. 2 Bul. 172. and 1 Leon. 59. Then with Regard to the coming after Sentence, he did agree that where a Want of Jurisdiction appears upon the Proceedings, this Defect may be taken Advantage of even at that Time; but where the Defect is only of Trial, he submitted

submitted it, it could not; and for this Purpose he cited 2 Keb. 439. and 1 Ven. 3. Mr. Fazakerly argued on the other Side, and said that whatever the Rule might be between Ecclesiasticks, yet he submitted it, that the Rule was quite otherwise in Suits between an Ecclesiastick, and a Layman; and that tho' the Right of Ecclesiasticks is only controverted. If this was not so, there might be a manifest Injustice to the Defendant; for the Continuance of a Usage for forty Years is allowed a good Custom in the Ecclesiastical Court; and therefore on such Usage the Ecclesiastical Judge might well Decree for the Vicar; but in another Suit brought by the Rector in the Temporal Court against this same Defendant, the Temporal Judge would decree for the Rector. Then with Regard to the Objection that had been made, that after Sentence a Prohibition cannot go for Defeat of Trial only, he submitted, the constant Course of the Court was otherwise; and if there were Opinions to the contrary, they could not be Law. In Respect therefore of the Offering, he conceived there was no Doubt, but the Rule ought to be made absolute. And with Regard to the other Part of the Suit, which was for the Agistment, he hoped the Rule would be made absolute for that likewise. He said he conceived that the Word *Altaragium* had never been extended to any Tithes but such as were due by Custom; and as to the other Clause, which is said to follow, he observed that the Words were not as were stated; but they were *Decimam bladorum crotorum crescen' infra clausur'*; so that by those Words Tithes of Corn only were granted. For which Reason he did conceive that the Rule which the Ecclesiastical Judge went by in this Case, was only founded upon the Usage; it appears that Matter was not fit for him to have tried; and therefore according to the Case in Salk. 348. the Rule ought to be made absolute. Mr. Dennison argued on the other Side, and said that though Offerings are Things of a spiritual Nature, yet the Quantum of them must be always ascertained by Custom; and therefore in those Cases, he conceived that a Prohibition would constantly lie after Sentence; for this Purpose he cited the Case of Tailor and Scot. 2 Lutw. 1059. Salk. 334. and 3 Keb. 123, 527. He observed farther, that this Endowment is not set forth in the Pleadings, though it appeared in the Proceeding of the Cause; but if it had, he submitted it, that this Court would have judged not only upon the Validity, but upon the Construction of it; and for this Purpose cited Moor 457 and Lit. Rep. 263. The Chief Justice said he thought it very clear that the Rule ought to be made absolute with Regard to that Part of the Suit, which concerned the Offering; because it appears the Plaintiff founded his Right to that intirely upon Prescription, and the Defendant by his Plea has denied there was any such Right. With Regard to the other Part of the Suit, which concerned the Agistment, he thought that there was something of Difficulty; but even as to that, he inclined that the Rule ought to be made absolute. His Reason was, because it was uncertain upon the Face of the Proceedings, whether the Plaintiff founded his Right upon the Endowment or the Prescription; the Endowment might have been thrown in only to prevent

prevent a Prohibition; and in the Course of the Evidence the Plaintiff might have made out his Title singly by the Prescription. Judge Page and Judge Probyn were of the same Opinion in both Points. Judge Lee agreed the same as to the first of them; but as to the last, inclined to think that the Prohibition could not stand, by Reason that it did not appear that the Spiritual Court have founded their Judgment upon the Trial of the Custom; for this Purpose he cited Carth. 33. and 93. However, he did not oppose making the Rule absolute even as to this Point, in order that this Matter might be more solemnly determined; accordingly the Rule was made absolute as to the whole of it. Vide postea.

The King *and* The Mayor and Aldermen of Shrewsbury.

How far a
Return to a
Mandamus
shall be said
to be certain
enough, or
not.

THIS was a Return to a Mandamus, to restore M^r. Corbet Kynaston to the Office of Alderman in the Town of Shrewsbury, which Return came now on in the Paper to be argued. The Return set forth that the Defendants were incorporated by the Name of Mayor, Aldermen, and Burgesses of this Town, by a Charter of 14 Car. 2. and that one of the Clauses of that Charter requires that the Mayor, Aldermen, and Assistants should be Inhabitants, and constantly residing either by themselves or Family in that City, or in the Parish of Holy Cross, or St. Giles adjoining to it, unless in the Time of Plague or other contagious Distemper. The Return set forth that Corbet Kynaston, one of the Aldermen of that City was not inhabiting or residing within it, or in other Places mentioned in the Charter, either by himself or Family, for the Space of three whole Years next before the 23d of Feb. 1722; and that during that Time there was neither Plague nor other contagious Distemper either in the City or other the Places above-mentioned. The Return farther set forth, that on the said 23d of February, the Mayor and major Part of the Aldermen and Assistants were duly assembled at the Guild-Hall, and that at such Assembly they entered into a Debate concerning the Non-residency of the said M^r. Kynaston; and because he had been absent so long, and during that Time abided in Places unknown to them, they removed him from his Office. M^r. Strange argued that this Return was insufficient both in Form and Substance. With Regard to the Substance of it, he conceived, that the Construction of this Charter must be, that though the Plague was not in Shrewsbury, or in the other Places above-mentioned, yet if it was in any other Parts of England, it would be a sufficient Excuse for M^r. Kynaston's leaving the Town. So if on Account of Sickness, he was obliged to go and reside in another Part of England, that would be a good Excuse for his Non-residence likewise; for which Reason it ought to have been averred in the Return, that M^r. Kynaston had neither this Excuse mentioned in the Words of the Charter, nor any other whatsoever. He then took two Exceptions to the Form of the Return; his first was, that it was not set forth that the whole Body had Notice of this Assembly; though he submitted it was absolutely necessary,

necessary, in as much as the Meeting was not on a Charter-Day; and so this Case was resolved in the Case of The King and Strangwayes, Hill. 1 Geo. 1. and if this had been on a Charter-Day, yet the major Part of the Assembly could not have gone on to a Determination of this Question, unless Notice of their Meeting had been previously given. He observed likewise, that the Manner of setting out this Assembly was bad for another Reason; because it is only alledged that the Mayor and major Part of the Aldermen and Assistants were present. It ought to have been set forth, that the whole Body was. It is only by the Operation of the Law that the whole Body are represented by the major Part; and Facts must be set forth in pleading, not what in Judgment of Law amounts to them. And though it was set forth that they were duly assembled, yet the Word duly could not help it; and for this Purpose he mentioned the Case of a Conviction upon the Same Acts, where it had been held that the setting out, that a Person not qualified killed the Same, was not sufficient, without setting forth how he was not qualified. His second Exception to the Form of this Return was, that it was not set forth that M^r. Kynaston had any Sort of Notice given him, before they deprived him. A personal Notice, he agreed, might not be requisite; because it is set forth in the Return, that M^r. Kynaston was in Places unknown to them; but a publick Notice ought to have been given, either at the Market-Place, Church-Door, or some other Place; and to shew that Notice of some Sort was requisite, he cited Salk. 434 The Chief Justice said, with Regard to the Substance of this Return, that he took it to be very good. The Words of the Exception he agreed were general; but yet they must receive some limited Construcion; and that he thought must be to the City, or other the Places above-mentioned; especially by Reason of those Words or other contagious Distemper; and therefore, as the Return has pursued this reasonable Construcion of the Words, he thought that Part to be clearly good. Then with Regard to the Want of Notice being given to M^r. Kynaston, he thought such Notice unnecessary, in as much as it is averred that he was in Places unknown to them; and for this Purpose cited Show. 305. The second Objection he thought had the greatest Difficulty. He did agree, that before the Statute of Anne, which allows Travellers to these Returns, these Returns ought to have been certain to every Intent, and possibly this Rule has not been altered since the Statute; but yet he observed, that no Case had been cited to shew that Notice of the Assembly was necessary to be set forth in these Returns, even before the Statute; and for this Reason he thought it not necessary to be alledged. And in pleading, where a Certainty to a common Intent is sufficient, undoubtedly such Notice is unnecessary to be set forth. The other Part of this Objection, that it is only alledged that the Majority of the Corporation were present, he owned, with him had some Sort of Difficulty; and at present inclined to think that this Exception was fatal; and in pleading he thought this would not be good. Judge Page inclined to think that since the Statute of Anne a Return of this Sort might not be more certain than a Plea; however with Regard to

to the other Part of the Objection mentioned by the Chief Justice, he was of Opinion with him. Judge Probyn and Judge Lee inclined to think the Return was Good, even in this Point, as well as the other. Accordingly this Matter stood over. Vide postea.

The King and Fuller.

Vide antea
387.

THIS was a Conviction for selling distilled Liquors by Retail without a Licence. Mr. Draper objected to it, that the Information and Evidence was all in the Preterperfect Tense, and likewise that the Judgment was quod forisfecit the Sum of 1 l. whereas it should have been forisfaciat, and cited The King and Hawkes, Vol. 1. 300. Mr. Wynne on the other Side submitted it, that the Law did not require, that Justices should finish these Proceedings in one and the same Day; and therefore with Regard to the Information and Evidence, he submitted it to be good. Then with Regard to the Words of the Judgment, he said, that the first Part of them was, that the Justices adjudge that the Defendant is guilty, and is convicted of the Premises. Indeed the Conviction goes on and says, that he has forfeited the Penalty; but that, he submitted it, need not have been set forth; for this Purpose he mentioned the Case of The King and Mynton, Mich. 3. Geo. 2. That was a Conviction for Deer-Stealing. No Description was there of the Penalty; yet the Court held the Conviction to be good. An Exception too was taken, that the Words of the Judgment were, Ideo convictus est, and that Exception over-ruled likewise. The Court however were of Opinion that all ought to be in the present Tense; accordingly the Conviction was quashed.

Astley and Brandwood.

Vide antea
344.

THIS Matter came on in the Paper a few Days ago, and then Mr. Agar desired that it might stand over till the next Term; because he was not prepared to speak to it. The Chief Justice said he believed the Exception of want of Seisin would be too strong for him to get over; accordingly made a Rule, that the Judgment should be reversed unless Cause today; and no Cause was now shewn.

Horn and Wood.

How far a Plaintiff shall be said to have discontinued, or not, his Action in such a Manner, as to intitle him to bring a new one.

ON Rule to shew Cause, why the Defendant should not be discharged out of Custody upon common Bail; the Case appeared to be in this Manner. The Defendant was arrested by Virtue of a Writ returnable on Thursday after the Octaves of the Purification. Term ended on Tuesday after the Octaves. And therefore the Day of the Return was mistaken. A few Days ago the Plaintiff obtained a Rule for discontinuing upon Payment of Costs, and served the Defendant with it,

it; since that, without having first discontinued, he charged the Defendant in Custody with a second Writ for the same Cause of Action. It was insisted upon by the Defendant's Counsel, that this was irregular in the Plaintiff to charge him with the second Writ while the first was depending, and upon that he obtained the present Rule for shewing Cause. Mr. Kettleby on the Part of the Plaintiff submitted it, that what the Plaintiff had done was very regular. He did agree, that before the Defendant is intitled to plead, the Plaintiff must enter up this Discontinuance in Form; otherwise the Defendant will be intitled to plead the first Action in Abatement of the second. But if the Plaintiff does get rid of the first Action before the Defendant is intitled to plead, it is sufficient. The Chief Justice said wherever a Plaintiff takes out a defective Process by way of Continuance to charge the Defendant with a good one afterwards, the Court will certainly discharge him upon common Bail, when he is charged in Custody with the second. But in the present Case this appeared to be only a mere Mistake; and therefore he thought that the Plaintiff might charge the Defendant with the second Writ, as soon as he had served him with the Rule for discontinuing. The Court were of the same Opinion, accordingly the Rule was discharged.

Pigot and Stibs.

ON Rule to shew Cause, why an Attachment should not be granted against the Defendant for Non-performance of an Award. Mr. Kettleby submitted it, that the Award was void, by Reason that the Submission was to Bouldwill and two others, three Foremen of the Jury. But the Appointment for making the Award, was signed by Baldwin and those two others. The Defendants Attorney attended them in Pursuance of this Appointment, informed them of this Mistake and told them if they should make their Award, neither Party would be bound by it, and therefore he should not attend them with any Evidence on the Part of his Client. One of the Arbitrators thought this a material Objection, and therefore refused to join in the Award; the other two did join in it, and Mr. Kettleby said, that this Defect appeared likewise, even upon the Award itself; for the Recital of the Award is, Whereas a Submission by Rule of Court was, to ——— Bouldmill and two others, of the Matters in difference, Now know ye that the said ——— Bouldwill otherwise Baldwin, together with one of the other Arbitrators, do make their Award, &c. Another Reason why Mr. Kettleby offered against the Rule was, that the Plaintiff did not make a Demand of the whole Money ordered to be paid by the Award, which he ought to have done. The Sum which he demanded was only 9 l. 4 s. 5 d. but besides this there was another Sum of 15 l. ordered to be paid for Costs, which the Plaintiff omitted to demand. The last Reason against the Rule was, that the Plaintiff had not sufficiently sworn in his Affidavit, that the Defendant was not at the Place for Payment of this Money at the Time appointed. The Place for Payment of this Money at, was an Ale-house. The

How far an Award shall be said to be good notwithstanding there is some Mistake in Respect of the Name of one of the Arbitrators.

Plaintiff swore that he was there all the Time, and the Defendant was not there any Part of the Time; for that he frequently went out of the Room where he was sitting and asked the Drawer whether he was come, and he told him he was not. The Chief Justice said, that he thought the first Objection would not hold, by Reason that a Man may have several Names, and he thought that in Pleading such Mistake might be set right; besides by the Award itself it appears they are the same Persons. He thought that the second Objection was of no Force neither, but the last did prevail with the Court. Accordingly upon that the Rule was discharged.

The King and The Aldermen of the City of London.

What shall be said to be such a kind of Office as that the Court will grant a Mandamus in order to admit the Party into it.

A Few Days ago one Smith had obtained a Rule to shew Cause, why a Mandamus should not be directed to the Defendants to restore him to the Office of Clerk of the Works of the City of London. When that Rule was moved for he made Affidavit that he was admitted into the said Office to hold it for Life, with all Fees and Profits belonging to it, that he took an Oath of Office and likewise the Oaths to the Government upon his Admission to it, that he paid the Sum of 600*l.* for it, and the Nature of his Office required him to survey all the Works of the City. Serjeant Uryln and other Counsel came to shew Cause upon this Rule. They said, they took it that the Rule of Law was, that no such Mandamus would lie, unless the Office was of a publick Nature. The present Office, if it was to be called one, was only of a private Nature. And they submitted it, that it ought to be considered rather a Service or Imployment, than an Office. This very Question that is now before the Court, they said came before them formerly, and then the Mandamus was refused; for which Purpose they cited 2 Sid. 112, and they took it to be a Case in Point. They said there were many other Cases in the Books depending upon the like Reason with this, and for that Purpose they cited Mod. Cases 18, 823. Salk. 232. Sid. 40, 169, 443. Sti. 437. Ven. 143. 1 Lev. 75, 153. Comb. 41, 127, 133, 347. *M^r. Fazakerly and M^r. Strange* argued on the other Side. They said the Case in 2 Sid. 112. is not stated with such strong Circumstances as the present Case is before the Court. They observed that the Case in *Nac. Brev. 218.* was fully with them, and of late Years Mandamusses have been granted in many more Instances than they were formerly. Judge Lee said since Lord Holt's Time Mandamusses have been granted for Sextons and Clerks of private Companies; accordingly the Rule was made absolute.

Griffin and Alcock.

Vide antea
397.

THE Chief Justice now delivered the Resolution of the Court upon this Case. He said the State of the Fact was in this Manner. A *Latitat* issued out of this Court directed to the Chamberlain of Chester or his Deputy, requiring them to issue

issue out a Precept to the Sheriff commanding him to take the Defendant, and to return what he does upon this Writ, to the Exchequer at Chester, that the Party may appear at the Day of the Return. The Plaintiff, without going to the Chamberlain or his Deputy, serves a Copy of this Process by his Attorney or Agent, upon the Defendant. And upon Oath being made of such Service, and the Defendant not appearing to it a common Appearance is filed for him. Whether this was regular, or not, was the Question. Two Objections, he observed had been made to it; First, that this was a Service of the Copy of the Latitat, whereas it should have been a Service of the Copy of the Writ issued out by the Chamberlain. The second that this Service should have been made by some Officer of the County Palatine, and not by the Plaintiff's Attorney or Agent. This Question he observed, depends upon the Construction of two Acts of Parliament, the one made 12 Geo. 1. 29, the other 3 Geo. 2. 27. If this Question had rested even upon the first Act of Parliament, they should have been of Opinion that a Service of a Copy of the Process issued out of this Court, would have been sufficient. That which caused the Doubt was the Case of Beakon and Smith, Mich. 1 Geo. 2. in the Common Pleas; that was a Process issuing to the head Officer of the County Palatine of Durham, which the Defendant was served with a Copy of. The Motion was made to stay the Proceedings there, and it is said the Court was of Opinion that the Defendant should have been served with a Copy of the same Process, by which he should have been arrested. As this Case was said to have been determined upon Debate, this Court would have conformed with these Resolutions, for the Sake of Uniformity in Practice, had this Case happened before the Statute of 3 Geo. 2. but they thought that Statute had put the Doubt beyond all Question. He observed that this Statute was a Law explanatory of the first; and therefore was to be construed according to the Words of it, without any other Explanation. By the first Section of this Statute, the Affidavit of the Service of the Process, which the Defendant is to be served with a Copy of, is to be made before any Judge or Commissioner of the Court, out of which such Process shall issue, authorized to take Affidavits in such Courts. Now the Judge or Commissioner, before whom the Affidavit of such Process is to be filed, cannot be said to be the Chamberlain or Barons of the Exchequer in Chester; for if it was, the Affidavit could not be read in this Court, and consequently the Effect of the Act will be evaded, if the Affidavit of the Service of this Process was to be made in that Court. Then the Copy of the Process, which is to be served, must be a Copy of the Process of this Court; for the Words of the Act are such Process, and the same Process is described throughout the whole of it. This he said was as much as was necessary to be observed in Answer to the first Objection. With Regard to the second, he said the doubt arises upon the third Section of the second of these Acts. The Difficulty ariseth, what Sense the Court are to put upon the Words particular Franchises. Counties Palatine, he said, might possibly sometimes be meant by those Words in the larger

larger Sense of them; but undoubtedly they are considered as superior Courts of the Kingdom; for this Purpose he mentioned 1 Saund. 73. and in the present Case he thought they were only intended to mean particular Liberties in Counties, and to save the Privileges in those Franchises accordingly, he said for these Reasons the Court were of Opinion that the Rule ought to be discharged.

The King and Bartlet.

Vide antea
318.

MR. Fazakerly and Mr. Noel came to shew Cause, why an Order of Sessions should not be quashed. This was an Order upon an Appeal from a Disbursement of Overseers, and an Allowance thereof. This Order recited that this Matter came before them at the last general Quarter-Sessions; and the Order was upon four Persons, that were Overseers of the Parish of Brackly St. Peters, in the Year 1730, to pay the Sum of 11 l. 5 d. out of the Disbursements of the Stock in that Year, to other four Persons that were Overseers in the Year 1732, which was done the same Year in which this Order was made. Mr. Abney had taken several Exceptions to this Order; First, that this was an Order made upon an Appeal lodged at a former Sessions, and it does not appear when that former Sessions was held, which it ought to have done, in as much as such Appeal could only be lodged at the Quarter-Sessions; besides, it was not set forth that there was any Adjournment; so that this Court that made the Order does not appear to have had a Jurisdiction. Secondly, that there ought to have been an Application to two Justices, previous to the Appeal at the Sessions, which does not appear to have been; because this is only an Appeal from the Disbursement, and the Allowance thereof, which Allowance might as well have been at a Town-Meeting by the Parishioners themselves, as by two Justices; to support this Exception he cited 2 Salk. 471. And Thirdly, that this is an Order upon four Persons to pay to four Persons; whereas if the Money was paid either by one of them, or to one of them, this Payment would have been equally good. Fourthly, that the Overseers in the Year 1730, are ordered to pay to the Overseers of the Year 1732; whereas the Payment should have been to the next succeeding Overseers in the Year 1731. Lastly, that this Stock might have been raised by private Charities; it doth not appear to have been raised by a publick Tax on the Parish; and if so, the Justices of the Sessions have no Jurisdiction. As to the first of these Exceptions, the Chief Justice said he thought the Order was good enough; for this Order recites the former one to have been made at the general Quarter-Sessions; as to the Matter of Adjournment, he did not think that the Sessions were bound to enter their Adjournment regularly, as this Court does. As to the third, he did agree that the Payment made either by one of the Overseers, or to one of them, would have been sufficient; but yet he thought the Form of the Order good in this Respect. The fourth Objection he said was of no Force; for if the

the Order had been, that the Payment should have been made to the Overseers of the Poor 1731, who were then out of Office, it would have been bad. With Regard to the last Exception, he said that the Court would intend that the Stock was raised by a publick Tax of the Parish. As to the second Objection, he inclined to think it was a good one. Judge Page and Judge Probyn agreed with the Chief Justice, as to the whole. Judge Lee agreed with him in all but the second Point; but he inclined to think that the Order was good even as to that; and what influenced his Opinion, was a Case cited by Mr. Noel out of Salk. 533. Accordingly this Matter stood over. *Vide postea.*

Coleby and Jenkins.

MR. Agar had obtained a Rule for shewing Cause, why a Prohibition should not be granted to the Admiralty Court in a Suit for Mariners Wages. The Suggestion which this Rule was obtained upon was, that this Contract was made between the Mariners and the Proprietor, and not the Master of the Ship; that it was a special Contract for 3 l. for bringing the Ship from Bristol to London, and likewise for 3 l. per Month in going other Voyages with the Ship, after they came to London. Mr. Agar had submitted it, that this was not in the common Form of Contracts for Mariners Wages, and therefore the Prohibition ought to go upon the Authority of the Case in Salk. 31. The Counsel on the other Side came now to shew Cause, and said that the Matter of this Suggestion was not pleaded below. Upon that the Rule was discharged.

How far a Prohibition will lie to the Admiralty Court, or not, in a Suit relating to Mariners Wages.

Anonymus.

MR. Fortescue came to shew Cause, why an Appointment of Overseers should not be quashed upon an Exception taken to it, that they did not appear to be substantial Housekeepers in the Parish. And the Case of Serle and Hantington, Mich. 13 Geo. 1. was cited in Support of the Exception. He observed that they were set forth in the Appointment, to be Gentlemen living within the Parish, and to be appointed according to the Form of the Statute. The Court thought neither of these to be sufficient; accordingly the Rule was made absolute.

How far the Court will quash an Appointment of Overseers.

Law and Law.

MR. Filmer came now to shew Cause, and said that this was a Declaration so long ago as this Term Twelvemonth, that the Defendant had seditiously and maliciously published and circulated a Bill during all that Time; and therefore he came with a very bad Grace to ask a Favour of the Court. But he said he did apprehend that it was expressly against the Rules of the Court to give the Defendant Leave to withdraw his Plea, but upon pleading the general Issue; for this Purpose he mentioned a Case which was

Vide antea 390.

Mich. 8 Geo. 1. That was a general Demurrer to the Declaration in an Action of Covenant. Serjeant Glide moved there to withdraw the Demurrer; the Court refused it; because they said a general Demurrer was the same as the general Issue. And according to his Notes of the Case they said farther, that if this had been a special Plea, and the Defendant had moved to withdraw it, he must have pleaded the general Issue. Mr. Fazakerly said on the other Side, that he hoped the Rule should be made absolute; he did agree that in an Action of Assumpsit the whole Merits of a Defendant's Case may come under the Plea of Non Assumpsit; and therefore in such Case, when he moves to withdraw his Plea, it may be reasonable to require him to plead Non Assumpsit which is the general Issue. But in Actions of Debt upon Bond, a great Part of the Merits of a Defendant's Case cannot be given in Evidence on Non est factum, which is the general Issue. It is as much the Merits of such Defendant's Case to shew a Performance of the Condition, an Excuse for not performing it, or to plead other Matter in Bar, as it is to plead Non est factum. And therefore in such Cases, he submitted it, it might be reasonable for the Court to allow a greater Latitude. He said he conceived too, that the Court had gone as far as this in other Instances; for this Purpose he repeated the Case which he mentioned before of Meard and Philips, Vide antea 3. and further mentioned the Case of Eades and Mason, Vide antea 139. He stated that Case to be a Motion to withdraw a Plea, and to plead Tender in Part, and Non Assumpsit in Part, in Lieu of it; and there the Court allowed it. The Chief Justice said he thought it would be allowing too great a Latitude, to give Leave to the Defendant to withdraw his Plea, but upon pleading the general Issue; and he never knew such Liberty given but upon those Terms. Judge Lee said, as to the Case of Meard and Philips, the Reason for that might possibly be, because the Pleading Nil debet in Debt for a Penalty, appeared to be a meer Mistake; but here the Defendant has knowingly rested his Defence upon one Matter, and therefore he thought it would be going too far to let him put it upon another, unless upon the common Terms of the general Issue. Judge Page and Judge Probyn said that they never knew such Liberty given, but upon those Terms; accordingly the Rule was discharged.

The King and Ellams.

Vide ante

A Few Days ago Mr. Fazakerly moved for a special Jury on the Part of the Defendant, in an Information in the Nature of a Quo Warranto, which was granted against him for exercising the Office of Alderman in the City of Chester. The Validity of his Election depended upon this Question, whether the Freemen of Chester had not a Right to vote at the Election of Alderman. For this Reason he said he took it for granted, that the Jury would not come out of the City of Chester, but out of the County Palatine, and at large. It was quite uncertain at present out of what Place it would come, because the

the Information was not settled, and therefore he prayed that a Rule might be made to shew Cause, why a special Jury should not be granted in this Cause, be the Jury to come out of what Place it would. Mr. Abney came now to shew Cause upon this Rule. He said the Place which the Jury would come from in this Case would be the County Palatine of Chester. And he did conceive the Court could not direct a special Jury in such Case; there was no Pretence that they could, before the Statute of 3 G. 2. 25. That Statute directs that in all Trials at Nisi prius, a special Jury shall be granted at the Request of either Party, in such Manner as special Juries have been and are usually struck upon Trials at Bar had in the respective Courts. Before this Act, nor even at this Day, no Pretence was there, that a Trial could be at Bar of a Cause of Action arising in any County Palatine. The Design of this Act was not that there should be a special Jury at Nisi prius in any Case, but where there could be a Trial at Bar; and therefore it was manifestly out of the Intention of the Act, that there should be a special Jury in this Case. Besides he observed that general Words in a Statute shall not extend to Counties Palatine; and so it appeared, that the Understanding of the Law-makers, was that Counties Palatine was not included to any Purpose by this Act; and for that Reason the Statute of 6 Geo. 2. 35. was made to extend to them to some Purposes. But that Statute extends only to Causes there in Bank; and therefore the present Case was not within the Relief of the Statute neither. Mr. Fazakerly on the other Side said he did agree that this Case was not within the Relief of the second Statute, for the Reason that has been mentioned, but conceived it was within the Relief of the first. Before this Statute he said indeed this Court did not grant special Juries in any Trials at Nisi prius. But the Court of Common Pleas and Exchequer did. And if those Courts had a Power of doing it, he conceived that this Court might have done so likewise, though they did not think proper to use it. The Court of Exchequer granted special Juries in Trials of Nisi prius, before this Act, even in Issues tried in Counties Palatine; for this Purpose he mentioned the Case of Sir George Warburton and Melon, in that Court, Hill. 4 Ann. There was another Case of Sir Roger Moston and Melon, a few Terms after. And Mr. Bootle observed, that he had a Case taken out of the Notes of Lord Chief Baron Ward, Trin. 1711. That was Thrustout on the Demise of Duke Hamilton against Floetwood. There a Motion was made for a special Jury in Ejectment in an Issue to be tried in Cheshire. That Matter bore much Debate; but the Motion was at last granted; and the Chief Baron observes in his Notes, that many Precedents were laid before the Court of the like Sort. Since the Act Mr. Fazakerly said there was a special Jury granted in that Court in the Case of Bowes and Mountague, upon his Motion, in an Issue tried in the County Palatine of Durham. That Case was determined on Debate, and was Trin. 3 Geo. 2. There was afterwards the Case of Orde and Clare, Trin. 4. and the Case of Medkese and Coke, Trin. 6. and several other Cases that have been in that Court. The Chief Justice said

he

he thought it certain, that the Court might grant a Special Jury in Causes at Nisi prius since the Act, though there could be no Trial at Bar: to this Purpose he mentioned the Case of the City of London and other Places which Juries are not obliged to come out of. He observed likewise, that though Process does not lie to Sheriffs in Counties Palatine, yet this Court may make Rules upon them, and may certainly punish them. He said he could see no Reason, why the Court could not make a Rule since the Act upon the Sheriff of the County Palatine of Chester to attend with the Freeholders Books before the Master of the King's Bench Office in this Court, especially upon the Cases cited out of the Court of Exchequer; accordingly the Court made the Rule absolute. *Vide* the next Case.

Anonymus.

AS soon as the Motion in the last Case was made Mr. Williams moved for a Rule upon the Town-Clerk of Chester to attend with the Charter of 37 Car. 2. at the Trial, because it was not introlled and a Copy of it would not be Evidence. Mr. Strange on the other Side said, that the Prosecutor had already obtained a Rule for Inspection of all publick Books, Papers and Records relating to this Corporation and for taking Copies of them, so that the present Rule he submitted it was unnecessary. The Court however was of another Opinion, accordingly granted the Motion.

Anonymus.

How far a second Certiorari will lie, or not, in order that the Proceedings of an inferior Court may be affirmed.

MR. Strange moved to supersede a Certiorari granted to the Justices of Shrewsbury to remove a Rate made for the Relief of the Poor in the Parish of St. Chad in that City. He observed, that there had been a former Certiorari granted in this Case, and a Return made to it, and filed in Mich. Term last, to which there had been Exceptions taken, one of which was for want of an Adjournment, and the Court made a Rule to shew Cause at that Time, why the Order of Justices made upon this Rate should not be quashed. This Term, instead of shewing Cause upon this Rule, the other Side obtained a Rule to enlarge it; and since have obtained a Rule for a second Certiorari in order to supply the Defects of the Return made to the first. Mr. Strange observed, that no Rule was better established, than that Amendment of such Return shall not be made, but in the same Term in which the Return is filed. And if this second Certiorari should be granted, that Rule concerning Amendments would be intirely evaded. Mr. Abney on the other Side said, he did agree the Rule concerning Amendments to be as has been mentioned, but he observed on the other Hand, that no Rule was more certain than that the Court will grant a second Certiorari in order to affirm the Proceeding of an inferior Jurisdiction, in Case the Merits of the Cause will justify

justify it. He said they had an Affidavit from the Clerk of the Peace, that the Adjournment was in Fact made, though he omitted to set it forth in the Return. And he could see no Reason why a second Certiorari should not be granted in Affirmance of the Proceedings in a Sessions, as well as in any other Court. And he remembered the Court had granted the like Motion in Instances of this Sort before. He said this was done in the Case of the Parish of Paulswalden and Hihilton in the County of Hartford, East. 13 Geo. 1. and the same was done in the Case of The King and The Inhabitants of Hetton, the Term following. He said he would not affirm that the two Certiorari's were granted in another Term, but he was certain of this, that they were granted. The Chief Justice said he did not think it material, whether they were granted in those Instances in another Term or not; accordingly the Court refused to discharge the present Rule, and soon after Mr. Hollins moved that the Return to this second Certiorari might be filed, which was done accordingly.

Burdus and Hosier.

MR. Abney came now to shew Cause, and said, that if this ^{Vide antea} had been the second Motion upon the Judgment, he should ^{369.} have agreed the Defendant would have been discharged upon Common Bail; but as it is only the first, he conceived that Special Bail was due. For this Purpose he mentioned the Case of Townsend and Mason, 1724, where Judge Raymond refused to discharge a Defendant at his Chambers upon Common Bail under the same Circumstances. The Court was of the same Opinion; accordingly the Rule was discharged.

Wells and Kitchenham.

MR. Strange came now to offer his Reasons why the Amend. ^{Vide antea} ment could not be; but believed it was too late in the ^{388.} Evening to go into this Matter now. The Chief Justice said that he was not a Peer at the Time this Writ was sued out, but Sir Philip York, Knt. and the Writ by which he was made Chief Justice by that Name, was inrolled in this Court. For which Reason he inclined to think that the Amendment of the present Cesse might be made by the Writ. However the Rule was enlarged.

Chance against Dod and others.

Thetford **I**N Cessment for Lands, part Freehold and part Copyhold, to prove an Admission to these Lands, Mr. Procter, as Counsel for the Plaintiff, produced in Evidence a Paper Book of the Acts of the Court, in which the Admissions and Surrenders of the Copyhold Estates were entered. He said that such a Book has constantly been allowed in Evidence. ^{What shall be said to be good Evidence of an Admission to a Copyhold Estate.}

dence at the Assises for the Counties of Norfolk and Suffolk to prove Admissions and Surrenders of Copyhold Estates lying in these Counties. But Mr. Baron Carter, that tried this Cause, was of Opinion, that this Book was no Evidence. The Roll he said ought to have been upon Parchment, and in Striðness should have been in the Form of Rolls made up in the Courts above; but if the present Admission had been entered in a Parchment Book he should have allowed it for Evidence. He said he did agree, that in a late Case the Chief Baron and two of the other Barons were of Opinion, that such Paper-Book was good Evidence; but at that Time he declared his Opinion to the contrary, and of this Opinion he still continued. Mr. Procter then produced a Copy of this Admission as Evidence of it, which the Judge allowed, and said it had often been so. Mr. Procter then went on to prove that the Party made a Surrender of these Lands to the Use of his Will, and for this Purpose produced a Paper-Writing testifying such Surrender made unto the Lord of the Manor signed by himself; and to prove this Surrender taken the Plaintiff's Attorney swore that it was signed by the Hand-Writing of the Lord himself, which the Judge allowed to be good Evidence, though Mr. Clark submitted it, that the Lord of the Manor ought to have been here to have proved it. Mr. Clark farther objected, that this Surrender ought to have been presented at the next Court; but this the Judge thought not to be necessary, as it is in the Custody of the Lord himself, and taken by him afterwards at the same Assises at Bury in the Case of Street and Roper, which was an Ejectment for Copyhold Lands. Mr. Prime objected that no Evidence could be given to prove these Lands to be Copyhold, but the Rolls themselves; but the Judge was of a different Opinion. A paper Book was then produced in Evidence of an Admission, which was not allowed; but a Parchment Book of the Admission the Judge did allow.

Pitcher and Rinter.

How far the Minutes of the Proceedings of a Court shall not be allowed to be read in Evidence.

Thetford **I**N an Action for a malicious Prosecution brought against the Defendant for inducing a Bailiff for forcibly taking away his Goods without a legal Authority, the Plaintiff to justify his having Authority, produced the Minutes of a Judgment in the Court-Baron, and likewise a Warrant for Execution made upon it; but the Judge was of Opinion, that the Judgment ought to have been drawn up, and that the Minutes were not Evidence of it. Accordingly the Plaintiff was nonsuited; though Serjeant Uryln submitted it, that 2 Mod. 306. is contrary to the Judge's Opinion.

Archer and Franklin.

Thetford **I**N Trespas for breaking the Plaintiff's House and Affises. false Imprisonment, the Defendant pleaded that a Capias ad respondendum was sued out against the Plaintiff, and a Warrant made out to the Defendant as Bailiff thereupon; he came to the Plaintiff's House and found the Outward Dooz open, and upon that he entered, and came to an Inward Dooz of a Chamber, wherein the Plaintiff was, which inward Dooz was shut; upon which he requested the Plaintiff to open the Dooz, but on his refusing to do so he broke it open and arrested the Plaintiff by Virtue of the same Warrant. In Evidence to support this Plea the Defendant produced this Warrant; but his Attorney owned that it was a blank one, and he filled it up; but notwithstanding this the Judge was of Opinion that the Warrant was legal; and in the Case of an Indictment of Murder tried before Mr. Baron Lovel he observed that Judge was of the same Opinion. The Defendant then went on to prove the other Part of his Justification, but because he failed in proving the Request the Judge directed a Verdict to be for the Plaintiff.

How far an Officer may justify under a Blank Warrant.

Evererd and Cob.

Bury Affises. **I**N Trover for a Ship the Judge would not asking the Cables, Rigging or Tackle, as it was not specially set forth in the Declaration, and in order to justify the Taking of the Ship the Defendant proved that she was stranded on Part of the Manor of Southwold; Nobody was then on board her, upon which he then boarded himself, thereupon detained her as Bailiff to Sir Charles Bloyce who was intitled to all Wreck and Salvage in the Manor of Southwold as Lord of this Manor. The Judge thought this a Matter of two great Difficulty to be determined at Nisi prius, accordingly a Verdict was given for the Plaintiff, subject to his Lordship's Opinion.

How far the Lord of a Manor may justify, or not, Detaining a Ship for Salvage.

Knipe and Payman.

Bury Affises. **I**N Trespas against the Defendant, for driving a Distress of Cattle, and impounding them above three Miles from the Place from which they were taken, the Plaintiff declared upon a Statute made the 12th of November in the first Year of Philip and Mary. To this Declaration the Defendant pleaded Not guilty; and on Evidence, Serjeant Uryln submitted it, that the Plaintiff ought to prove that the Statute was made on the Day mentioned in the Declaration; but the Judge was of another Opinion, and said, that if the Defendant objected, that the Statute was miscited, it was incumbent upon

When an Action is brought upon the Statute of Ph. & M. relating to Distresses, what shall be said to be a good Declaration in such Action.

upon him to shew that it was so. The Serjeant then said that he was ready to shew by the printed Volume of the Statutes, that this Parliament was held on the 11th of November, and not on the 12th; upon which Mr. Clerk produced a Copy of this Act of Parliament from the Records of the Tower, wherein it appeared, that the Day mentioned in the Declaration was the right one; accordingly a Verdict was given for the Plaintiff.

The King against Blumfield and others.

When two Defendants are joined in one Indictment, how far one of them cannot be a good Witness for the other, notwithstanding no Evidence is given against him.

Bury Assizes. **I**N an Indictment for a Battery, Mr. Procter submitted it, that one of the Defendants should be a good Witness for the other, in as much as no Evidence was given against him; but the Judge was of another Opinion, as the Grand Jury has found the Bill against this Defendant, as well as the other; accordingly the Judge was of Opinion that the Indictment was sufficiently proved; upon which Mr. Lloyd said that he believed Circumstances of Aggravation would not be so proper to be given in Evidence here, as to be laid before the Court above by Affidavits, when they are setting the Fine. But the Judge said these Circumstances would be proper to come from his Report; accordingly these Circumstances were entered into.

The King against Malet and others.

How far a Person shall be said to be a sufficient Inhabitant, or not, in order to be capable of being chosen a Member of a Corporation.

Bury Assizes. **O**N five Informations in the Nature of a Quo Warranto, against several Defendants, for exercising the Offices of Capital Burgesses in the Borough of Oxford, there were four Issues joined in each of them; First, that the Defendants were not Inhabitants at the Time they were chosen, which the Charter requires they should be. Secondly, that Robert Duffin who presided at their Election, was not Mayor. Thirdly, that the Defendants were not duly elected. And lastly, that they did not take the Oaths proper on such Occasion. In Evidence on the first Issue, the Counsel for Malet, one of the Defendants proved that he was born in the Town, that he served an Apprenticeship with his Father, and lived a Journeyman with him ever since. On the other Side we submitted it, that this was not sufficient to make the Defendant an Inhabitant. To make him so, he ought to have been a House-keeper; and for this Purpose I cited 2 Inst. 703. The Judge likewise declared his Opinion, that to make the Defendants Inhabitants within the Intent of the Charter, they not only ought to have been House-keepers, but even to have payed Scot and Lot to the Poor; accordingly the Judge directed the Jury to find a Verdict against three of the Defendants, for their not being able to prove such an Inhabitancy. In two other of the Informations the Defendants Counsel were able to prove such an Inhabitancy; upon which they went on to prove their second Issue, that Robert Duffin was Mayor at the Time he presided,

and

and submitted it, that the proving him to be so de facto, would be sufficient; but the Judge was of a different Opinion, and said that they must prove him in all Respects to be Mayor de jure; and for this Purpose directed them to shew that he had taken the Oaths to the Government duly, according to the Statute; but when the Defendants Counsel proceeded in the Proof of that, it appeared that the Sessions held for the Borough wherein he took these Oaths, were not held at the Time limited by the Charter; accordingly a Verdict went for the King on these two Informations, as well as the others.

Term. Pasch.

7 Geo. II. 1734.

How far an
Information
shall be
granted, or
not, against
Justices of
Peace for
making an
unequal
Rate.

Anonymus.

MR. Strange moved for an Information against the Justices of the Town of Shrewsbury, for making an unequal Rate for partial and corrupt Purposes, and the Court made a Rule to shew Cause. Vide postea.

The King *and* The Justices of the Peace of the County of Surry.

How far a
Mandamus
will lie to
require an
Officer to do
an Act which
a Statute di-
rects.

MR. Strange came to shew Cause, why a Rule should not be made absolute for granting a Mandamus to the Justices of the County of Surry requiring them to direct the Clerk of the Peace to assign over the Effects of Anne Robinson to Richard Metcalf, in Pursuance of the Statute of 2 Geo. 2. 22. He said, he should not dispute but this Court may grant a Mandamus to an inferior Jurisdiction to put in Execution the Powers they are intrusted with; and therefore if the present Rule had been prayed for a Mandamus to the Justices, requiring them to order the Clerk of the Peace to make an Assignment of the Effects of Anne Robinson to one of her Creditors generally in Pursuance of the Act, he should not have opposed its being made absolute; but a special Mandamus, as this is, to make an Assignment to one particular Creditor by Name, he believed was never granted. Mr. Wynn argued on the other Side, and said that the Court has granted Mandamusses to receive the Appeal of a particular Person, and in the late Case of Lord Suffolk they did grant a Mandamus for Letters of Administration to be made out to him by Name, and for the like Purpose he mentioned Ven. 184. he observed likewise in the present Case, that the Assignment could not properly be made to any one but Richard Metcalf, for Anne Robinson had but five Creditors besides Metcalf, four of them are Prisoners as well

well as herself. Sir William Jolliff is the fifth, and he has had the Possession of her Effects for a long Time together, even before her Imprisonment, so that he was not a proper Person to have the Assignment made to him neither. He said he had the Affidavits of several Persons, that Richard Mercalf was a Creditor, and the other Side had not one Affidavit to the contrary, though he owned they did not allow him to be so. The Chief Justice said, that he thought their not owning it was of it self sufficient to prevent a Mandamus going in this particular Manner. And as to the Case of Lord Suffolk, he remembered the Reason why that Mandamus was granted so, it was because it was owned on both Sides, that he was the proper Person to whom it ought to be granted; accordingly the Court refused making the Rule absolute in this Manner, but amended it and made it to be, that a Mandamus should go to the Justices, requiring them to order the Clerk of the Peace to make an Assignment of the Effects of Anne Robinson to one of her Creditors generally in Pursuance of the Statute.

Hancock and Duboys.

THE Defendant was served with a Copy of a Process by the Name of Duboys. And the Plaintiff filed an Appearance for him by that Name in Pursuance of the late Act, and since that signed Judgment against him for want of a Plea, where as his Name was Davoys and not Duboys. Upon which Mr. Draper moved that the Judgment might be set aside; but the Court was of another Opinion. They said before this Act it was certain, that if a Defendant's Name had been mistaken in the Process, which he was served with, no Advantage could have been taken of it, but by a Plea of Misnomer. They thought this was the same Thing under this Statute; accordingly refused the Motion.

When a Person is served with a Copy of Process by a wrong Name, how far no Advantage can be taken of it but by Plea of Misnomer.

Anonymous.

MOTION was made for a Certiorari to remove up an Assessment of a Poors Rate made originally at the Sessions. The Counsel said that he conceived that this was not like the Case of Utoxeter, Vide antea 198. for there the Assessment was made by two Justices, and if the Certiorari had been granted the Appeal of the Parties would have been taken away, accordingly a Rule was made to shew Cause. Vide postea.

How far an Assessment of a Poors Rate shall be said to be good, or not.

The

The King and Gibson.

When a Defendant is convicted upon an Indictment, how far he shall not be allowed to make any Motion relating to the Proceedings, unless he is present in Court.

ON Motion to set aside a Verdict in an Indictment of Forgery. Mr. Strange objected that the Defendant ought to be present in Court; he said he did agree in the Case of a special Verdict this is not necessary; because there the Defendant is not found guilty; and of that Opinion the Court was in the Case of The King and Hays, Vol. 1. 166. but in the Case of a Motion to set aside a Verdict, he must be present equally as in Motions in Arrest of Judgment; because a Jury hath found him guilty of the Fact. Mr. Marsh on the other Side submitted it, that this Case was distinguishable from that of Arrest of Judgment; but said he would look into the Cases, and move this Matter again. The next Day the Chief Justice said that he had himself found two or three Cases upon this Head, where the Court had been of Opinion, upon Debate, that the Defendant must be present in these Motions, as well as in those in Arrest of Judgment; for this Purpose he mentioned the Case of The King against Lunt and Woamwelh, Mich. 7 Will. and that of The Queen and Rickbarth, Pasch. 12 Ann. both in Point; and the Court was of the same Opinion. Vide postea.

Burtlet and Smith.

When several Arbitrators are appointed, how far an Award may be made by some of them without giving Notice to the rest.

MR. Abney came to shew Cause, why an Attachment should not go against the Defendant, for not performing an Award made the 22d of January last. There were two Objections that he made to it; the first was, that one of the Arbitrators had no Notice given him of the Meeting, when this Award was made. The second, that the Arbitrators had made their Award before upon the 19th. As to the first, he did agree that the Reference was made to three of the Arbitrators, or two of them, but in all such Cases every one of the Arbitrators must have Notice of the Meeting, which in this Case one of them had not. As to the second, he did agree that the Award was not sealed nor Stamped till the 22d, but was signed on the 19th, which makes it a compleat Award; and on the 22d, Alterations were made in it. The Counsel on the other Side said, that the Arbitrators had Notice on the 19th, and then one of them declared he would not meet any more; for which Reason they conceived that no farther Notice was requisite. They observed farther, that though there was a Paper-writing signed on the 19th, yet that was never delivered by the Arbitrators till after the 22d; and therefore till then they could not be said to have executed their Authority. The Court were of Opinion that both the Exceptions were answered; accordingly the Rule was made absolute.

Baycroft *and* Lister.

THE Defendant had been arrested in the Marshalsea Court with a Writ for 8 l. and had been held to Bail for that Sum; but the Plaintiff was entered only for 5 l. and on Certiorari, the Officer returned that the Cause of Action was for no more; upon which on Mr. Agar's Motion the Court made a Rule, that the Praecipe and Bail-Bond should be produced, that the Plaintiff's Attorney should answer the Matters of the Affidavit, and that all Proceedings in the mean Time should stay. *Vide postea.*

When a Certiorari or Habeas Corpus has issued in order to remove up the Proceedings of an inferior Court, how far the Superior

Court will rectify the Proceedings below.

Harris qui tam *and* Reney.

IN Debt upon the Statute of 15 Car. 2. 8. there was no Affidavit made, that the Cause of Action accrued within a Year before the Commencing the Suit, which Serjeant Wright submitted it ought to have been by the Statute of 21 Jac. 1. 4. and therefore he moved that the Proceedings might be stayed. He said, in the Case of Hotel qui tam and Beck, this Point was not fully examined into; but went off by Consent; and therefore he prayed a Rule to shew Cause, which the Court accordingly made. *Vide postea.*

How far that Part of the Statute of 21 Jac. 1. c. 4. which directs that the Party in certain Cases shall find an Affidavit that his Cause of Action arose

within a Year before the Commencing of the Suit, shall extend, or not, to Actions brought upon subsequent penal Statutes.

The Parish of Thatcham *and* The Parish of Bucklebury.

AN Order of Sessions removed up by Certiorari being now confirmed by this Court, Mr. Emmet moved for Costs upon the Statute of 5 Geo. 2. which the Court upon some Consideration gave, though at first the Chief Justice something doubted.

The Construction upon that Part of the Statute of 5 Geo. 2. which gives Costs in Cases of Orders made upon Appeal.

The King *and* Hellsop.

MR. Filmer took three Exceptions to an Order of Bastardy; First, that one of the Justices did not appear to be of the Quorum. Secondly, that it was only said in the Recital that the Child was born in the Parish, and not in the Adjudication; to support which Exception he cited the Case of The King and Godfrey, Trin. 12 Geo. 1. Thirdly, that the Justices have ordered the Defendant to give Security to the Parish; accordingly a Rule was made to shew Cause. *Vide postea.*

How far an Order of Bastardy shall be said to be good, or not, in Respect of the Form of it.

Anonymus.

How far in
Trove the
Defendant
can plead
but two Sorts
of Pleas in
Bar; name-
ly, Not
guilty, and
a Release.

IN Trover, the Defendant had pleaded that he made no Conversion of the Goods of the Plaintiff; and this Cause having come on to be tried before the Chief Justice, he was of Opinion that the Defendant had admitted a Property in the Plaintiff, and thereupon there was no Defence; upon which Mr. Strange now moved for a new Trial, and that the Defendant might have Liberty to plead de novo, by Reason that this was a meer Mistake in the Pleading. The Chief Justice said it has been often held that there are but two Pleas in Trover, Not guilty, and a Release; and therefore the present Manner of pleading was owing to a Mistake; accordingly a Rule was made to shew Cause, why a new Trial should not be granted; but the Court said the other Part of the Motion, with Regard to pleading de novo, must be made afterwards.

Rennick and Jones.

How far a
Deed shall be
directed only
to stand as a
Security for
the Money
which was
bona fide ad-
vanced.

Chanc. **J**OHN Rennick, the Plaintiff's Brother, had an Estate left him of 25 l. per Annum, when he was very young and went to School with the Defendant who taught him Writing and Latin, and supplied him with all Necessaries. Afterwards the Defendant put him out an Apprentice, which cost him 40 l. but never received any Thing for his Trouble; soon after the Time that he came of Age he fell ill of a Consumption, and returned to the Defendant's House as a Visitor. While he was there, the Account was made up between the Defendant and him, and a Ballance of 160 l. found due to the Defendant, for which a Bond was given, and within a Day or two after he was persuaded to make a Deed to the Defendant, by which he gave him all his Estate in Fee-simple; this Deed was said to be made in Consideration of 200 l. and for divers other good Considerations, whereas the Debt of 160 l. was the only valuable Consideration. Upon this a Bill was brought to set this Deed aside. This Cause was heard before the Master of the Rolls, and he decreed accordingly. And now upon an Appeal the Chancellor was of the same Opinion, and this for two Reasons; First, because the Recital of the Consideration was false in itself. Secondly, Because he had reserved no Estate to himself during his Life; and therefore ordered that the Deed should stand for a Security only of the 160 l.

Anonymus.

MOTION was made to set aside a Trial had at Huntington Ames, for that the Defendant lived above forty Miles from the Place where the Trial was, and yet that there was not fourteen Days Notice given. The Chief Justice said that such Notice of Trial is only requisite to be given where the Cause is tried in London or Middlesex, and the Defendant lives at forty Miles Distance from that Place; accordingly the Motion was refused.

How far it is requisite, or not, that there should be fourteen Days for Notice of Trial.

Blagrove and Hupkins.

IN the Declaration delivered, there wanted Pledges, for which Cause the Defendant demurred; and the Plaintiff demanded Oyer of the Bill, on which Pledges were entered, and then joined in Demurrer. Motion was now made, that the Paper Book might be made agreeable to the Declaration delivered; and the Motion was granted.

How far the Court will direct that Paper Book should be made agreeable to the Declaration delivered.

Anonymus.

IN a Suit by Bill brought against the Defendant as Attorney, he pleaded that he was one of the Clerks of Mr. Ventris, and did not traverse that he was an Attorney; but verified his Plea by Affidavit. Motion was now made to set this Plea aside; First, because being Clerk to Mr. Ventris, and Attorney of the Court is the same Thing. Secondly, because he did not conclude his Plea with a Traverse. To the first of these Matters, the Chief Justice said that a Person might be Clerk to Mr. Ventris, and not Attorney of the Court; to the second he said, that might be a Cause for demurring to the Plea, but not for setting it aside; accordingly the Motion was refused.

How far the Court will not set aside a Plea in Abatement.

Price and Ginkins.

MR. Strange moved that an Under-Sheriff might answer the Matters of an Affidavit for granting a Replevin upon a Distress after the five Days were expired appointed by the Stat. of Ann. 8. 14. for taking insufficient Sureties on the Replevin, and likewise for suffering the Plaintiff's Attorney to sit as Judge in it. But the Court thought neither of these Causes sufficient to grant the Motion. To the first they said, a Replevin may be granted at any Time before Sale. To the second, that the taking Sureties was only for the Under-Sheriff's own Indemnity. To the third, that he ought not to answer criminally for the Plaintiff's Attorney acting against his Duty. However the Court made a Rule upon the Plaintiff's Attorney, that he should answer the Matters of the Affidavit.

How far the Court will not direct that an Under-Sheriff shall answer the Matter of an Affidavit, notwithstanding a Complaint made against him, relating to a Replevin.

Williams

Williams and Brown.

Vide antea

THIS Matter coming on again in the Paper, the Substance of the Case appeared to be in the Manner following. Thomas Spead having two Daughters by different Centers, Mebethobel and Martha, devised a Society of his Lands to certain Trustees and their Heirs, in Trust for Mebethobel for Life, and after her Decease To the Use of all and every Child and Children both Male and Female born and to be born of the Body of the said Mebethobel, equally to be divided between them, and to the Heirs of their respective Bodies lawfully to be begotten, and for want of such Heirs then to the Use of the Children of Martha. The other Society of his Lands he devised to the same Trustees, in Trust for the raising a Term for the Benefit of Martha for Life, for her sole and separate Use, until her Husband Thomas Golney should settle 100 l. per Ann. for every 1000 l. he received as Fortune with her, on her for Life, the Remainder to the Children of their two Bodies begotten, with Words of cross Remainders, or such as were to the like Effect. And in case such Settlement should be so made, then he limited the Trust of this Term to be to Thomas Golney for Life, the Remainder to Martha for Life, the Remainder of the Term to attend the Inheritance; and then he devised the Inheritance of this Society to the Children of Martha, exactly in the same Manner as he had devised the other Society to the Children of Mebethobel; and in Default of such Issue of the Body of Martha, then he devised the same to the Children of Mebethobel; the Remainder of both Societies to his own right Heirs. After the Death of the Testator, Mebethobel had two Daughters, one of which married Spead; the other that married Smith. Martha had seven Children, three of which died, and Thorp married one of the surviving Daughters. Mebethobel died, one of her Daughters that married Spead died, and upon her Death Thorp entered into a Quarter-Part of the Lands belonging to that Spead, who was the Daughter of Mebethobel. Upon which Smith brought an Ejectment against him, insisting that he was intitled to it in the Right of his Wife by Way of cross Remainder. Serjeant Birch argued on the Part of the Plaintiff, and for Authority cited 4 Leon. 14. Ven. 224. but more particularly relied upon the Case in 2 Cro. 655. Serjeant Wright argued on the other Side, and for Authority cited Bro. Tit. Devise 38. Dyer 303. and Sir Thomas Jones 79. The Chief Justice said, that he did own the Authorities in the Books were pretty strong, that these cross Remainders should not be admitted, unless the Intent of the Testator plainly appears in Favour of them; and therefore he did agree, that if there were no particular Circumstance in the present Devise, but only the common Words and for want of such Issue, a cross Remainder could not be allowed of. But in the present Case he thought it a Circumstance by no Means to be disregarded, that the Testator's Daughters were by two Centers, and therefore he could not be supposed to intend, that one of the Centers should be any ways bene-

benefited by the Estate given to the other till all the Children arising from that Center were dead. To this Purpose he observed the Words of the Will were To all and every the Child and Children. He observed likewise that the Fact was that Mehechobel had but two Children, therefore though for Argument sake it might be admitted to be a Doubt, if there were more Children, yet as there happens not to have been more, the Case seems much the stronger. And under this Circumstance it seems to agree with what is admitted by the Judges in 2 Cro. before cited. He observed likewise, that in that Case there were three distinct Houses separately devised to three distinct Children; Difficulties therefore there might well arise, if the Children should take by Way of cross Remainder in what Manner they should take. Here there can be no Difficulties of that Sort; for if cross Remainders should be allowed, undoubtedly the Children will take the cross Remainders as they took the first Interest. He said likewise if the Judges could take Notice how the Trust would be construed in this Case in a Court of Equity, that would much confirm this Opinion: for there undoubtedly there are to be cross Remainders. But of that likewise he owned he a good deal doubted; and for this Purpose mentioned the Case of Papillon and Boyce, lately in the Court of Chancery. There Lands were devised to one for Life, Remainder to Trustees to preserve contingent Remainders, Remainder to the Heirs of his Body lawfully begotten. And likewise by the same Will a Sum of Money was devised to be laid out in the Purchase of Land to be settled to the same Uses. In a Bill brought to have this Land and Money settled in strict Settlement, and that the Devisee should be only Tenant for Life, with Remainder to his first and other Sons in Tail-Male, the Master of the Rolls was of Opinion that the Lands should be decreed so, as well as the Money should. Upon a Rehearing the late Chancellor was of the same Opinion as to the Money, but not as to the Land; and the Chief Justice inclined to be of the same Opinion with the Chancellor. However he said, upon the Whole, his present Thoughts were, that the cross Remainder ought to be admitted in the present Case; but for the Difficulty the Matter stood over. *Vide postea.*

The King *against* Tyrer and others.

THE Defendants had demurred to an Information in the Nature of a Quo Warranto, and now Mr. Strange moved that they might withdraw it, being willing that the Prosecutor should sign his Judgment. But the Court said this could not be done without Consent; accordingly refused the Motion.

How far the Court will not give Leave that the Party may withdraw his Demurrer.

The King *and* Gibson.

Vide antea
412.

SINCE this Matter came on before, the Defendant had been committed by the Court, and now upon its coming on again it was not thought necessary that he should be brought up by the Marshal, for his being in Custody was said to be sufficient; though this is otherwise in Capital Offences, for there the Prisoner must always be at the Bar. Now Motion was made for a new Trial upon the following Exception. The Indictment charged the Defendant with forging a Note, purporting to be a Note under the Hand of Lady Margaret McCartney, whereby she acknowledged herself to be indebted to the Defendant for divers Sums of Money, which she had borrowed and received of him, for other Sums which he had paid on her Account, and likewise for Money paid by him for Goods to her Use, which Sums amounted in the Whole to 221 l. 12 s. and then the Indictment set forth the Note in hæc verba. But the Defendant's Counsel insisted that the Purport of the Note was not duly set forth; for by the Purport of it the Goods that are mentioned are said to have been bought of others by the Defendant for the Use of the Lady; but in the Note itself they are said to be delivered by the Defendant to the Lady, and that might either be by the Defendant's Selling of those Goods or by his Buying them for her. But the Court declared their Opinion to be, that this Variance was not made out; because it does not appear by the Note but the Goods delivered might be bought for her by the Defendant. But even supposing it to be a Variance, the Chief Justice, Judge Page and Judge Probyn, severally declared their Opinions, that it would signify nothing; for as the Note is set forth in hæc verba the declaring the Purport of it is only to be considered the Sense which the Grand Jury had of it; accordingly for these Reasons the Motion was refused.

Bridgman *and* Skinner.

When a Defendant pleads that the Plaintiff struck him first, how far he shall not be allowed to give in Evidence a very violent Battery by way of Justification under that Plea.

At the Sittings **I**N an Action of Assault and Battery, the Defendant pleaded De son Assault; and now upon Evidence the Fact appeared to be, that upon some few Words arising between the Plaintiff and Defendant about a Fork which the Plaintiff had in his Hand, the Defendant endeavoured to take it from him, upon which the Plaintiff gave him a slight Blow or two; and upon that the Defendant struck the Plaintiff so violent a Blow over the Eye, that the Cure of it cost the Plaintiff two Guineas. Upon this Evidence the Chief Justice declared to the Jury, that the Defendant's Endeavouring to take the Fork from the Plaintiff, was an Assault; and therefore for that Reason they ought to find a Verdict for the Plaintiff; but even supposing this Circumstance had been out of the Case; yet still he said, the Plaintiff's giving the Defendant a slight Blow could not justify the Defendant's returning it

it in so violent Manner. Thereupon on both Accounts he thought the Jury ought to find a Verdict for the Plaintiff, which they accordingly did; however they gave him but 12 d. Damages; because they thought him to blame as well as the Defendant.

Bycroft and Lyfter.

MR. Benny coming now to New Cause, it appeared, that the Intention of the Parties was, that the Suit below should be but for 5 l. And that the Writ's being for 8 l. was owing to a Mistake of the Officer; accordingly the Return of the Statute of Jac. 1. was allowed; but because the bringing this Habeas Corpus was in some Measure owing to the Plaintiff's Attorney, he was obliged to pay the Costs of it; and upon those Terms the Rule was discharged.

Vide antea
413.

Day and Seirl.

ON Rule to New Cause why a Prohibition should not go to the Admiralty Court, M^r. Marsh said, that the Suggestions upon which the Rule was obtained were of two Sorts; First, that this was a special Agreement between the Mariners and Master of a Ship containing special Covenants; secondly, that this Agreement was in Writing under Hand and Seal. In Answer to the first of these Matters he said, that these Covenants were only of the same Import with the Statute of 2 Geo. 2. 36. so the Party has covenanted that he will not do that, which that Statute says he shall not do. In Answer to the second, he said, the same Statute requires that the Contract between the Mariners and Masters shall be in Writing; therefore such a Circumstance as there being a Seal to it, he hoped would make no Difference. Besides he said, that even before this Act, Contracts being under Hand and Seal, he conceived, was no Cause of a Prohibition. The Case in Salk. 31. is the only one on that Side of the Question, and in 3 Lev. 60. there are two Cases to the contrary. M^r. Draper argued on the other Side, and said that he did agree, that some of the Covenants were in Pursuance of the new Statute; but others of them are against it; particularly he said that the Mariners have Covenanted, that they will not desert their Master's Service to go into that of the King's, which the new Statute gives them a Power of doing. And as to the Cases cited out of Levintz, they appear to have related to Charter-Parties, which are Contracts between the Master and the Owners, and therefore not applicable to the present Case. The Court was of the same Opinion in both Points; accordingly the Rule was made absolute.

How far a Prohibition shall go, or not, to the Admiralty Court, in a Suit relating to Mariners Wages.

The King *and* Betsworth.

How far a
Mandamus
will not lie
to the Eccle-
siastical
Court, in or-
der to re-
quire them
to grant Let-
ters of Ad-
ministration.

A Mandamus having been granted to the Defendant, requiring him to make out Letters of Administration, Mr. Taylor moved, that it might be superseded upon an Affidavit that there was a Suit now depending concerning the Probate of the Will. He said he hoped the Court would not expect a Return of this Matter; and for this Purpose he cited 5 Mod. 374. The Chief Justice said that it appeared by the Affidavit, that the Suit was commenced since the granting the Mandamus, and therefore it could hardly be a Reason for superseding it; however, a Rule was made to shew Cause. A few Days after, this Matter came on again, and then Mr. Strange consented that the Writ should be made absolute.

Harris qui tam *and* Rene.

Vide antea
413.

MR. Kettleby came now to shew Cause, and relied upon the Cases in Salk. 372, 373. as Authorities for him in Point. Serjeant Wright argued on the other Side, and said that he conceived the Reason of the Case was plainly with him; and as to the Authorities cited out of Salk. he said the first of them was likewise reported in Carth. 495. and there no such Resolution was mentioned; and with Regard to the second Case he said the Reporter himself states it, that Lord Chief Justice Holt was of a different Opinion. The Chief Justice said that the first Section of the Statute of Jac. is plainly confined to Offences then in Being; and the third Section, which the present Case depends upon, only relates to the same Offences; for which Reason he thought that in Reason the present Case was out of that Statute; and the Case in Salk. seemed to him to be Authorities in Point. Judge Page said that he was of Counsel in the first of those Cases reported in Salk. and he remembered Lord Chief Justice Holt delivered the Opinion of the Judges, as is there mentioned; and Judge Lee said that he had a Manuscript Note taken at that Time, which directly confirms the Case as stated in Salk. Accordingly the Rule discharged.

The Parish of Hever *and* The Parish of Sundridge.

How far a
Person shall
gain a Settle-
ment by be-
ing in Pos-
session of a
Leasehold
Estate.

IN an Order of Sessions, confirming an Order of two Ju-
stices, the Fact was specially stated in the Manner following;
Thomas Gates, the Father of the Person removed, had some
Years ago a Lease of a Tenement for ninety-nine Years made
to him, at the Rent of 5 s. per Annum, which was stated to be
the full Value of it, for any Thing that appeared to the con-
trary. Gates made his Will and devised this Tenement to his
Son, upon Condition that he paid to his Mother 20 l. if she
had Occasion for it; his Mother died soon after, so the Money
was never paid her. Upon this State of the Case, the Justices
adjudged

adjudged that there was no Settlement in the Son by this Term. Mr. Strange moved that this Order might be quashed. He said in the Case of Worsly and Gaundborough, Trin. 4 Geo. 1. it was held that such a Term would gain a Settlement, as a Copyhold Estate. Accordingly a Rule was made to shew Cause; but afterwards the Court conceiving some Doubt in this Matter, the Rule was enlarged. *Vide postea.*

The King and Hellsop.

MR. Strange came now to shew Cause; and as to the first Ex- *Vide antea*
ception he said, that this was an Appeal to the Justices of the Borough of Richmond, from an Order made by two Justices living in a Parish within that Borough; and in such Case he submitted it, it was necessary that the Justices making the Order should appear to be of the Quorum; and for this Purpose he relied upon the Words of the Statute of Car. 1. 4. (15.) which give the Justices of particular Districts the same Power as Justices of the County at large, without requiring them to be of the Quorum. To the second of the Exceptions he did agree, that if there was no Adjudication that the Child was born in the Borough of Richmond, the Order would have been bad; but he submitted it there was one. For the Order sets forth, Whereas *Mary Dodsworth* was delivered of a Female Bastard Child in the Borough of Richmond, which is now living and likely to become chargeable. So that this was not a Recital of a Complaint that the Child was born there, but of the Fact that she actually was so; and therefore amounted to an Adjudication. To the last he did agree, that the Justices had no Power to require the Defendant to find Sureties; and therefore so much of the Order as related to that must be quashed; but the other Part would be good notwithstanding. The Court was of Opinion the first Exception was not answered, and the Chief Justice said that as the Clause of the Statute of Car. 1. has given Justices in particular Liberties the same Power of determining these Matters, as Justices in the County at large have by the Statute of Eliz. the Statute of Charles must be construed to have given it them in the same Manner; accordingly upon this Exception the Order was quashed; and then the Court bound the Defendant over to appear before the Justices of the Borough of Richmond, before whom the Appeal was, taking his own Recognizance for that Purpose.

Wainwright and Church against Bradshaw.

ON Rule to shew Cause, why a Prohibition should not go to the Court of Litchfield, Mr. Abney said this was a Suit that was instituted below, in Order to compel the Defendants, who are Church-wardens, to bring in their Accounts before the Parishioners. To this the Defendants pleaded, that there was a Parish Meeting, and that they delivered in there their Accounts of Receipts, Expences and Disbursements, according to the

When a Suit is
instituted in
the Ecclesi-
astical Court,
relating to
Church-war-
dens Ac-
counts, how
far a Prohi-
bition is pro-
per to be
granted.

antient Usage and Custom of the Parish, and that the said Account was examined and allowed by the Minister and a great Majority of the Inhabitants and Parishioners there present, according to Law, and that they subscribed their Names thereto. Mr. Abney said that by the eighty-ninth Canon in 1603, the Ecclesiastical Court has a Jurisdiction of compelling Churchwardens to bring in their Accounts before the Minister and Parishioners, and no other Persons have a Power of allowing those Accounts but themselves. However, in the present Case, the Churchwardens have pleaded, that their Accounts were allowed by the Inhabitants at Large, as well as the Parishioners, and the Inhabitants at Large have nothing to do in this Matter. Mr. Strange and Mr. Dennison argued on the other Side, and said it was certain the Ecclesiastical Court could do no more than compel the Churchwardens to bring in their Account before the Vestry, and so this Point was determined, on Debate in the Case of Hutchins, Churchwarden of Hammer-smith, against Robinson and Cary, Mich. 1 Geo. 2. and in that of Horrey and Caudrick, Easter Term last, both which Cases were in the Court of Exchequer. And therefore the single Question must necessarily depend upon the Defendant's Plea; and as to that they thought it might well be understood that no other Inhabitants were meant, but those that were Parishioners. The Court declared their Opinions to be the same; accordingly the Rule was made absolute.

Hollowday and Pit.

To what Time Privilege of Parliament shall be said to extend.

THE Defendant being a Member of the last Parliament, and taken in Execution by the Sheriff of Surrey, within two Days after its being dissolved, Serjeant Darnel said that the Privilege of those Members lasts forty Days after the End of the Parliament; for which Purpose he cited 2 Lev. 72. and thereupon prayed that he might be discharged out of Custody; accordingly a Rule was made to shew Cause. Vide postea.

Harris and Burley.

When a Writ is brought quod coram vobis, how far the Court will give Leave to take out Execution.

ON Motion for Leave to take out Execution, notwithstanding a Writ of Error Quod coram vobis; the Counsel said that Coverture was now assigned for Error, which was tried in the Original Action in the Palace Court, and found to be false; and they cited the Case of Han and Bushel; accordingly a Rule was made to shew Cause. Vide postea.

Reynolds against Hyde and others.

What Share in a personal Estate shall be said to be bequeathed by a Will.

CANC. UPON an Appeal before Lord Chancellor, the Question depended upon the Construction of a Will. Humphrey Hyde had three Sons and two Daughters, and devised three Parts of his personal Estate amongst his three Sons equally; the

the fourth Part of it he devised to his two Sons likewise, to laid out by the Approbation of his two Daughters, Elizabeth, who married King, and Margaret, who married Reynolds the Plaintiff; and after the Money should be so laid out he devised the Interest of it to his two Daughters respectively for their Lives, and afterwards to their and either of their Child or Children, and for want of such Children, to his three Sons, equally to be divided between them. His Daughter King died without Issue; his Daughter Margaret died leaving one Son behind her; which Son conveyed all his Right under the Will to his Father the Plaintiff; and what Share the Plaintiff was intitled to was the Question before the Court. The Master of the Rolls had been of Opinion that he was only intitled to an eighth Part of the Personal Estate, namely, to such a Share of it only, as his Wife was intitled to at the Time of her Death. The Chancellor was now of a different Opinion; he did agree, that Elizabeth and Margaret were only Tenants in common, by Reason of the Words Respectively; but yet he thought that the whole Share of the two Daughters belonged to any of the Child or Children, which either of the Daughters should have, by Reason of the express Words of the Will for that Purpose. Accordingly decreed a fourth Part of the Testator's personal Estate to the Plaintiff.

Hemmet and Hughes.

Canc. **H**UGHES devised an Estate to Trustees for the Payment of 30 l. yearly to a Parson who should preach twice on a Sunday, and for the Payment of 10 l. yearly to a Schoolmaster, who should Teach ten poor Children to read and write, and appointed his Brother to be Parson and Schoolmaster for his Life. Upon a Bill brought for Directions of the Court concerning this Charity, and upon its appearing on the Master's Report, that the Brother who was so appointed had preached but once on every Sunday, and that he had got another to teach the School for him, without ever teaching it himself, the Master of the Rolls had decreed, that Half of his Salary as Parson should be deducted, for his having performed but Half his Service, and that as to his Employment of Schoolmaster, he should be deprived of it for his having not served it himself. This Cause coming now to be re-heard upon an Appeal before the Chancellor, he confirmed that Part of the Decree, which related to the Deduction of Part of the Salary; but upon the Party's promising for the future to teach the School himself dispensed with the Forfeiture at present; however, gave the other Side Liberty to apply to the Court again in Case of his not performing his Promise.

How far the Court will direct that Part of a Parson's Salary shall be deducted.

How far the Court will direct that a Person shall be deprived of an Office by Reason of his not attending it.

The

The King *against* Archer and others.

How far the
Justices of
Peace be-
longing to a
Corporation
shall be said
to have a Ju-
risdiction, or
not, exclu-
sive of the
Justices of
the County
at large.

ON Rule to shew Cause why an Information in the Nature of a Quo Warranto should not be granted against the Defendants, for holding and adjourning a Sessions in the Borough of Warwick, Mr. Abney said that the Foundation, upon which the former Rule was maintained, was, that only the Charter-Justices have a Power of sitting in the Borough of Warwick, and not the Justices for the County at large. But he conceived that the Justices at large have such Jurisdiction equally with those of the Borough. He did agree that this Town was incorporated in the Year 1693, and by that Charter the Town-Justices are appointed; but there is no exclusive Clause in that Charter which takes away the Jurisdiction of the Justices at large. And therefore by the Authority of the Case of St. Albans in the Time of Henry the Seventh, the Justices at large may still sit within this Borough, as well as they could before. But their Case was much stronger; for since this Charter, a Statute was made in 6 Will. 3. which by express Words gives them a Power of sitting as Justices, and holding Sessions within the Borough equally with the Justices appointed by the Charter. This was a Statute that was made soon after a Fire that happened in Warwick, to encourage the Gentlemen of the County to come and reside in it. He did agree, that it was a private Statute; but they had a Copy of it printed by the King's Printer, which would be good Evidence even at Nisi prius; and the Court of Common Pleas was of that Opinion a Term or two ago, in a Case that came before them. But supposing this Point should be against them, he said the Fact which the Defendants did, was not sufficient to shew that they acted as Justices. He did agree that there was a Sessions for the Borough held, at which the Defendants were present, as well as the Charter-Justices. A Question came before them concerning a Rate, which they were of Opinion ought to be adjourned. A Doubt arose, whether it should be adjourned to the 21st of February, or the 15th of April following. The Majority even of the Charter-Justices were of Opinion that it ought to be adjourned only to the 21st of February. However they rose up in some Heat, the Books of the Court were carried away on a sudden; and the Defendants only gave Directions to one Man to enter a Minute of the Adjournment, and to another to make an Adjournment in Pursuance of it; and even then Brainsford the first of the Senior Aldermen, and who was of the Quorum, was present. And lastly, he concluded, that supposing all this should be against them, the present Application was not proper. He said if the Court should be of Opinion, that the Charter-Justices had a Jurisdiction exclusive of the Justices at large, the Corporation was interested in this Matter. The Corporation therefore might maintain an Action against the Defendants, for intruding into their Franchises; and that was a much more proper Remedy, than this which has been taken. Mr. Strange argued on the other Side and said, as to the Con-
struction

struation of the Charter, he conceived that the Justices at large were excluded by it. The Charter appoints that the present Mayor, the preceding Mayor, the Recorder, the three senior Aldermen, and certain others of the Aldermen shall be Justices within the Borough for the Time being, of which the Mayor, and the Recorder, and one of the three Senior Aldermen shall be one. These Affirmative Words in the Charter imply a Negative, that no other shall be Justices; and therefore was it not for the Statute there could be no Pretence for other Justices joining with them in holding a Sessions. The Stress of the Argument therefore that has been made, arises from that Statute. And he submitted it there could be no Colour for saying, that the Justices at large could hold a Sessions, without the Presence of one of the Justices appointed by the Charter to be of the Quorum; and little Reason was there to maintain, that a Sessions could be held without the Presence of another Charter-Justice, as well as of him that is of the Quorum. If so, there could be no Pretence to say that that was a legal Sessions, where the present A^a was done; for it is agreed on all hands, that no other Charter-Justice was then present, but one that was of the Quorum. The Question therefore will resort to this, whether what they did was a judicial A^a; and upon the Fact as stated on the other Side, he submitted it clearly to be so. And with Regard to the last Objection, he said there was no Occasion to consider whether the Corporation could maintain an A^a or not; if what he had said before was true, that the Defendants had usurped a Franchise which did not belong to them, there could be no Sort of Doubt but the King might call them to an Account for it. The Chief Justice said, that where there are no exclusive Words in a Charter, the Justices at large may a^a within the Borough, but cannot a^a as Justices for the Borough. They cannot therefore hold a Sessions for Matters arising in it; for which Reason, if the present Question had depended singly upon the Construcion of the Charter, without the Assistance of the Statute, he should have had no Sort of Doubt but an Information would lie for the Justices at large holding a Sessions within it. The great Question therefore depends upon the Construcion of that Statute. And as to that he did indeed think that the Presence of one of the Charter-Justices, appointed to be of the Quorum, was still necessary to constitute a Sessions; but yet his Opinion was, that one of the Justices at large, together with such Quorum Justice, might well make one. He thought therefore, that supposing it should be admitted, that what the Defendants did, together with that Quorum Justice, did amount to a judicial A^a; yet still the Court ought to discharge the Rule. But his Opinion was, that in Reality it was no such A^a; for the A^a of the Court was done before, when the Majority voted for adjourning it till the 23d of February, and the ordering a Minute of it to be entered, was what any Stranger might have done; and the actual Adjournment was only in Consequence of it. As to the Remedy that had been taken, he owned it would have been a proper one, provided a Case has been laid before the Court, suitable to require it. But as he was fully persuaded that this was

not such a one, and as the Corporation may take the other Remedy that has been mentioned, he was of Opinion the Rule ought to be discharged. The rest of the Judges concurred in the same Opinion; and the Rule was discharged accordingly.

Anonymus.

How far a
Mandamus
will lie to
make a Rate,
or not.

MR. Fortescue moved for a Mandamus to be directed to the Governours of the Workhouse of Plymouth, requiring them to make a Rate in Pursuance of the Statute of 6 Anne, by which they were Incorporated. He did agree, that Motions to make an equal Rate the Court has sometimes refused, and by the present Statute where the Rate is unequal, he did agree an Appeal is given. But in the present Case the Complaint is not that any Persons are unequally rated, but that some Persons are rated who ought not to have been rated at all. The Court unanimously agreed, that if a Distress was made upon these Persons they might bring an Action of Trespass, for that as to them the Rate was merely void; accordingly the Motion was refused.

Vernon and Acherly.

Vide antea
212.

Canc. **T**HIS Matter now coming on again, upon the Hearing of the Cause, the Lord Chancellor declared his Opinion, that a perpetual Injunction ought to be granted. He said it appeared to him now upon the Hearing, that Mr. Acherly himself, together with his Wife and Daughter, had in the Time of Lord Macclesfield brought a Bill in this Court against Mr. Vernon, praying that certain Deeds and Writings might be delivered up to him, relating to some Fee-Farm Rents which he supposed himself intitled to in the Right of his Wife as Heir at Law; and likewise praying an Account of the mean Profits. Mr. Vernon by his Answer set forth a Will of the Person, whom Mr. Acherly's Wife was supposed to be Heir at Law to, and by that Will all the Real and Personal Estate of that Person was conveyed to him. The Testator indeed had not those Fee-Farm Rents at the Time of making his Will; but soon afterwards bought them and then made a Codicil to it. Mr. Vernon likewise preferred a cross Bill against Mr. Acherly; and upon a Hearing before Lord Macclesfield, Mr. Acherly's Bill was dismissed and a Decree made in Favour of Mr. Vernon. Upon this Mr. Acherly appealed to the House of Lords; the Judges were ordered to attend; the Question was proposed to them, whether the Codicil amounted to a Republication of the Will; accordingly they were of Opinion that it did. The Question then was particularly proposed to the Lords, whether that Part of the Decree relating to the Fee-Farm Rents should be reversed; and they were of Opinion, that it should not. The Question then was generally proposed to the Lords; of what Opinion they were concerning the Decree, and they resolved that it should be affirmed in toto. Since this Mr. Acherly

cherly has brought a Replevin in one of the Courts of Law to try this Matter over again. The Lord Chancellor observed, that in the Case of Sherwin and Sherwin, and of that of Leighton and Leighton. Upon full Debate the Court granted such an Injunction as this which is prayed, where there had been four Clerks concurring for the Party; and such an Examination as the present Question has received, he took to be at least Equally, if not much more solemn; and for these Reasons he founded his Opinion, that the perpetual Injunction ought to be granted.

The King *and* Robe.

MR. Marsh and M^r. Strange having now come to New Cause upon this Rule; the Chief Justice was of Opinion, that it ought to be made absolute, and that for two Reasons. First, That for that one Esc. by Robe's Direction, took 1 s. 2 d. for marking fourteen Pint Pots, and never did mark them; so that this Fee could only be for examining them, which is clearly illegal. Secondly, That several Persons were fined by him for not appearing at his Court, which is illegal likewise; for they ought only to have been amerced. The rest of the Court were of the same Opinion; accordingly the Rule was made absolute. And at the same Time the like Rule was made so against Anderson, for that it appeared that he acted as Servant to him. Vide postea.

Vide Vol. 1.
263.

Doe, on the Demise of Savile, *against* Boorlace.

A Rule having been made to New Cause, why Judgment should not be arrested for the Demise in an Ejectment being laid after the Memorandum; M^r. Noel said he did agree, that the Memorandum was of Michaelmas Term last, and the Demise was of Hillary Term following; but he said the Action is held to commence from the Time of the Bill filed, and not from the Time of the Memorandum; for which Purpose he mentioned 2 Lev. 13. And the Plaintiff has filed his Bill since the Time of the Demise; for which Reason he should pray, that the Memorandum may be amended by that. The Court said that would be a sufficient Answer. But because M^r. Noel was not able at present to verify his Fact of the Filing the Bill, the Rule was enlarged for a Day or two. Afterwards he did make out his Fact, and then the Amendment was made, and the Rule discharged.

How far a
Demise shall
be said to be
rightly laid,
or not, in an
Ejectment.

Foster and Grayham.

Vide antea
341.

THIS Matter coming on in the Paper again, Serjeant Eyres said, that he was ready for the Defendant in Error; but believed the other Side gave the Point up. Accordingly no Body appearing for the Plaintiff, Judgment was affirmed, unless Cause within a Week.

The King and The Bishop of Litchfield and Coventry.

Vide antea
363.

THIS Matter now coming on again upon the Return, Serjeant Birch prayed, that a peremptory Mandamus might be granted. He said the Return sets forth, that there was a Representation drawn up by several Inhabitants of the Town of Coventry, setting forth great Immoralities of M^r. Rushworth, and that there were Affidavits made, charging him with great Misbehaviours, and a Certificate to the same Effect. The Return farther set forth certain Articles in hæc verba, exhibited against him in the Bishop's Court for several Spiritual Offences; that a Caveat was entered in Pursuance of them, that M^r. Rushworth appeared to these Articles by his Proctor, and that they were now depending against him. It was farther alledged, that by one of the Canons in 1603, which were confirmed by the King's Letters Patent on the 6th of September 20 Jac. 1. it was necessary for every School-master to take a Licence from the Bishop. And that the old Canons made before that Time required the same. That M^r. Rushworth was a Clergyman; and that for the Reasons above mentioned he suspended granting him this Licence. The Serjeant submitted it, that this Return was insufficient. He said that in Salk. 432. it is laid down, that the Law requires the most exact Certainty in these Returns; but in the present one it is not set forth with any Certainty what the Purpose of the Affidavit was, nor that it was sworn before one having a legal Authority, and if this was in the Case of an Indictment of Perjury, the setting forth an Affidavit in this Manner would not be sufficient; and so is Latch 39, 133. The same Objection may be made to the Certificate; and as to the Articles against M^r. Rushworth that could be no Objection in his Way; for a Charge can be of no Force against a Man till he is convicted upon it. He observed farther, that it was not set forth in this Return that ever the Bishop gave M^r. Rushworth Notice to appear and answer these Charges; and in the Case of D^r. Bently, who was degraded by the University of Cambridge, he took the clear Opinion of the Court to be, that in a Suspension, as well as Degradation, it was necessary that the Party should have an Opportunity to be heard. These Objections he submitted it might well be made to shew, that the Cause returned by the Bishop for refusing the Licence was not sufficient; and were it not that M^r. Rushworth had applied for a Mandamus, and so had in some Measure admitted that a Licence was necessary, he could

could produce many Authorities in the Law to shew, that no Licence was necessary at all. For this Purpose he mentioned 1 Ven. 41. and he said there were diverse others to the same Purpose. Mr. Parker argued on the other Side, and submitted it to be very certain, that in these Cases a Licence is necessary. The Statute of 1 Jac. 1. 4. (9) and 13 & 14 Car. 2. 4. (8) take Notice of it to be so. In the old Canons made by the Popes this is required in 1 Mod. 3. the Case stated in 1 Ven. 41. is reported contrary, and the Authority of 2 Lev. 222. is full in Point. He observed farther, that the Granting such Licence is a judicial Act, and may be well compared to a Bishop's refusing to admit a Person to a Living who is presented, and in such Case it is held in 5 Rep. 57. that no Mandamus will lie. He conceived that there was the same Reason that it should not in the present Case, and for this Purpose mentioned 1 Keb. 5. Sid. 40. and Sty. 457. But supposing it should, he said, the Return was a full Excuse for not complying with the Writ. The Return has set forth the Reasons why the Bishop suspends the Granting his Licence at present; Articles are exhibited against the Party, he appears to them; by which he himself takes Notice of them; and till he has acquitted himself of the Charge, he conceived it to be highly reasonable that the Licence should be suspended; and to shew that such general Returns have been allowed, he cited 5 Rep. 158. and Show. Par. Ca. 88, 96. The Chief Justice said, that as it is set forth in the Return, that the Party applying for a Licence was a Clergyman, he believed it must be admitted that a Licence was necessary; because the Canons in 1603, require it, and it must be admitted that they do bind the Clergy; but he did not think they bound the Laity, as they were never confirmed by Parliament. He said it has not been made to appear, that those antient Canons that have been mentioned were ever allowed of by the Courts of the Common Law; therefore he could not see that by any Canon it could be made appear that a Layman could be obliged to take such Licence. He said, with regard to the general Question of taking these Licences, he thought it very material to be established, that the Laity were not bound to take them by the Canon Law. If they were, a Mandamus could never be granted requiring them to be made out to one particular Person; but an Appeal would be the proper Remedy. If on the other Hand this Obligation arises only from the Statute Law; though the Bishop may be said to act in some measure Judicially, a particular Mandamus may be granted. The principal Question therefore in the present Case resorts to this, whether the Bishop has not set forth a sufficient Excuse for refusing to grant this Licence at present, and as to that he thought that he clearly had upon Account of the Articles containing a Criminal Charge being exhibited against the Party; he having appeared to them, and that Matter not being yet determined. The rest of the Court were of the same Opinion; accordingly a peremptory Mandamus was refused to be granted. However the Matter stood over. Vide postea.

Harris *and* Burley.Vide antea
422.

MR. Strange came now to New Cause, and said that he did agree, that the only Difference that he could find between the Case of *Hern and Bushel* and the present one was, that there Coverture might be specially pleaded in the Action below, here it was given in Evidence upon the General Issue, and therefore there the Court would not allow of that Matter of Fact to be assigned for Error, because there might possibly be a Disagreement upon Record in the two Verdicts. However he said, that the Case of *Thomson and Lion*, East. 4 Geo. 1. was directly contrary to that of *Hern and Bushel*. He produced now the Affidavit and the several Rules, that were made in that Cause, and the Case appeared to be exactly the same as stated by him in that of *Hern and Bushel*. Mr. Parker argued on the other Side, and said it was a settled Rule in the Law, that no Man should be at Liberty to assign both Errors in Fact and Errors in Law upon the same Judgment, and therefore he conceived, that no Writ of Error quod coram vobis should lie after Affirmance of the Judgment, unless the first Writ of Error was for some Cause abated; for this Purpose he said, it has been held in 1 Ven. 207. that such Writ of Error will not lie after Affirmance of a Judgment in the Exchequer Chamber. He did agree, that the Case as stated in Salk. 337. is against this; but it appears by Lilly's Ent. 278. that that Case is misstated, and that the first Writ of Error abated by the Death of the Party. The Chief Justice, Judge Pao and Judge Probyn declared their Opinions, that as it was a settled Rule that Errors in Fact and Errors in Law could not be both assigned in the same Judgment; they thought that Rule ought not to be evaded in this Manner, and therefore that no such Writ of Error would lie after the Affirmance of a Judgment. Judge Lee said it was certain upon the Authority of the Case of *Walker and Stokoe*, Car. 368. that no Writ of Error quod coram vobis is any Superfedeas without Leave of the Court; that there was no Reason for allowing this Writ of Error to be so. Accordingly they all concurred, that the Rule ought to be made absolute. However that the Case of *Thomson and Lion* might be looked into, the Rule was enlarged for a Day or two. Vide postea.

The King *and* The Justices of the Peace of Lancaster.

When a Mandamus issues in order to appoint Overseers and a Return is made to it, how far such

UPON a Return to a Mandamus for appointing Overseers, Mr. Dennison excepted to it, that it was only said that in Pursuance of the Mandamus we do humbly certify, that did nominate and appoint, &c. without saying that we did. Accordingly upon this Exception the Return was disallowed.

Return shall be said to be certain enough in point of Form, or not.

Harris and Burley.

THE Chief Justice said now, that he had considered farther of this Case, and was fully satisfied of his former Opinion. He said the only Cases, that inclined the other Way, are those in Roll's Abr. 675. and Salk. 337. but as to the Case in Roll's upon the Face of it there appears to have been a Mistake in it, and there is a much more true and perfect State of it in Yelv. 117. and as to the Case in Salk. that appears to have been mistaken likewise, and was truly answered by Mr. Parker. Judge Lee said he had looked into his Notes for the Case of Thomson and Ligon, and could not find that he had taken any Notice of it. He said that these Writs of Error ought to be allowed in open Court; and he did not see any Reason for allowing the present one; accordingly the Rule was made absolute.

Vide ante 430.

Dobs, on the Demise of Luken, against Pascher.

IN an Ejectment the Tenant was served with a Declaration the 3d of January last; he did not appear to it; accordingly Judgment was signed against him the 15th of February following. The Landlord had no Notice of any Thing of this, till the 23th of February, and then obtained a Summons against the Plaintiff's Attorney before Judge Lee to shew Cause, why Proceedings upon this Judgment should not be made. The Judge ordered, that upon the Tenant's consenting to appear, and entering into the Common Rule to take Notice of Trial for the next Assizes, which were to be on the 6th of March, and on Payment of Costs, Proceedings should be made. Notwithstanding this Execution was taken out, and upon that a few Days ago Mr. Strange obtained a Rule to shew Cause, why the Execution should not be set aside. Mr. Abney came now to shew Cause upon this Rule, and said he should not contend but that the Ordinary Rule of the Court now was to set aside regular Judgments, where there has been no Trial had, upon the Party's taking Notice of Trial at the same Time as otherwise it would have been, on Payment of Costs, and in all respects putting the Plaintiff into the same State as he would have been in case Judgment was not signed. But he submitted it, that that Rule did not extend to Ejectments; because the Defendant may easily try his Title by being Plaintiff in a new Ejectment; and for this Reason it is, that this Action does in many respects differ from others. Mr. Strange on the other Side said that he conceived, that there was rather stronger Reason for setting aside these Judgments in Ejectments than there was in other Actions, by Reason of the very great Consequence that Possession is always found to be of in these Suits; and for this Reason it is, that though formerly the Rule of the Court used to be not to grant new Trials in Ejectment, yet of late they have been always allowed of. The Chief Justice said, if the

How far the Court will set aside a Judgment in Ejectment on Payment of Costs, notwithstanding the Judgment be regular.

the Landlord had omitted making his Complaint before the Judge so long, as that the Lessor of the Plaintiff could not have prepared himself to have gone to Trial by the last Assizes, he should not have thought that the Motion would have been regular. However, as nothing of this is pretended, he thought it was so; and he observed that he himself, as well as some other of the Judges of this Court, had inquired of the Judges of the Common Pleas, how the Practice of their Court was in this Respect, and they informed them that there was no Difference in this Matter between this Action and others. The rest of the Court was of the same Opinion; accordingly the Rule was made absolute.

Devnish and Mirkins.

Vide antea
373.

Serjeant Baynes now moved that the Rule might be made absolute. Mr. Hayward on the other Side said, that the Leave for discontinuing was founded upon his Motion; and if the Court was of Opinion that the Plaintiff ought to pay double Costs, he should not desire to make Use of that Rule, as no Discontinuance has been entered in Pursuance of it. The present Rule for Costs he said was founded upon that Rule; and therefore as he was willing to consent that that Rule should be discharged, he submitted it, that would be a sufficient Cause, why this should not be made absolute. But if the Court should be of another Opinion, he was ready to lay before them Affidavits to shew that the Defendant did not act as Justice of Peace; and if that could be done, he conceived that would be a sufficient Cause shewn upon this Rule beyond all Question. The Court did not think that his consenting to withdraw his former Rule, was a sufficient answer to this Motion; nor did they think that the Affidavits were; because they were not in themselves sufficient. However a Doubt arose amongst the Court, whether in this Case the double Costs ought not to be obtained by Rule of Court, rather than upon a Suggestion. The Chief Justice said, that the Statute of Jac. gives these Costs to Officers, where the Defendant obtains a Verdict, or the Plaintiff becomes nonsuited, or discontinues, and these Costs are given according to the Course of the Court. He observed in the Case of a Verdict or Nonsuit, the Court gives these Costs upon the Judge's Certificate; and in Case by any Accident the Certificate cannot be had, the Court will allow it to be supplied by a Suggestion. For there, even in the Case of the Nonsuit, the Defendant is not out of Court; though the Plaintiff is; but here by the very Discontinuances being entered, both Parties are out of Court; and therefore the Suggestion comes too late. For which Reason he thought that a Rule of Court was the proper Method; that would be a Justification to the Officer to allow them, and is according to the Course of the Court in like Cases. Judge Page and Judge Probyn were of the same Opinion. Judge Lee had some Doubts, whether this could not be done by way of Suggestion. In the Case of Catherol and Cowper, Vide antea 241. where there was a Nonsuit, it was done

in this Manner. In the Case of The King and Poland, where there was a *Clerdix*, which is cited in the Case of Catherol and Cowper, it was done by Suggestion likewise. The same was done in the Case of Sir Philip Egerton, Commissioner of the Land Tax, and likewise in that of Bateman and Wallis. If such a Suggestion should be allowed by the Court, it could not be traversed or demurred to; it is only entred in this Form, *Ec quia constat per Sacramentum, &c. Ideo, &c.* and therefore at present he did not see but that it might be allowed. Accordingly upon the Court's having a Doubt in this Matter, the Rule was enlarged. *Vide postea.*

Hollowday and Pit.

AT the Time of the former Motion it appeared, that there were several other Persons that had charged the Defendant in Custody with Declarations, and accordingly Rules were made upon them to shew Cause likewise. *M^r. Wynn* now appeared as Counsel for one of them, whose Name was *Green*. He said the State of the Fact with Regard to him was, that a few Days after that the Defendant was arrested in the Manner that has been mentioned in the former Motion, he voluntarily removed himself by Habeas Corpus out of the Fleet, where he was in Custody for other Actions, and turned himself over to be charged with those in the King's Bench; soon after that, *M^r. Green* charged him in Custody with a Declaration, which *M^r. Wynn* submitted it he was well intitled to do. He said, that he conceived that there was no Privilege due to any Member after a Parliament is dissolved. In all the Books that he could find, the Privilege of Members is only described sitting the Parliament; for this Purpose he mentioned 4 Inst. 46. and Hackwel's *Modus tenendi Parliamentum* 69, 208. Wages were never pretended to be due to a Member after the Dissolution of Parliament; to which Purpose he cited 4 Inst. 48. and conceived therefore that Privilege could not be said to last longer. But if such Privilege could be allowed at all, at least it could only be allowed the Party for a reasonable Time *cundo & redeundo*; this is the Case of a Witness subpoenaed to attend a Trial; for which Purpose he mentioned *Raymond* 100. And it is not pretended in the present Case, that for two Days after the Parliament was dissolved, the Defendant made any Offer to return to the Place of his Abode. He said farther, that supposing what the Plaintiff did, would of itself have been a Breach of Privilege, yet what the Defendant did was a Waiver of it; for he has brought himself into this Court voluntarily by a Habeas Corpus; and for this Purpose he cited *Dy. 33. 2 Rol. Abr. 69. and Brook, Title Privilege 25.* And if all this should be against the Plaintiff, yet the Method, which the Defendant has pursued, to take Advantage of this Privilege, was intirely irregular. He said he should have pleaded this Matter, or obtained a Writ of *Superfedeas*; and for this he cited *Lach 48. Salk. 544.* and he believed, that there was not one Instance could be produced, in which such Breach of Privilege could be taken

Advantage of by Way of Motion. Mr. Dennison was Counsel for another of these Plaintiffs, one Mr. Neal; he relied chiefly upon the Irregularity of the Manner in which the Defendant would take Advantage of his Privilege; and for this Purpose cited 13 Rep. 63. and Sid. 29, 42. Some other Counsel argued for some other of the Plaintiffs. Serjeant Darnel, Serjeant Chappel, and Mr. Strange argued for the Defendant. With Regard to the Point of Privilege itself, they took it to be beyond all Question, that for some Time the Privilege of Parliament lasts after the Dissolution of it. The Statute of 12 & 13 Will. 3. 3. expressly takes Notice of this, and in 4 Inst. 46. the Words are *Exinde ad propria redeundo*. The Case in Lev. which was before cited, allows it to be forty Days; but if that was not so, at least a reasonable Time was given them for returning to their proper Abodes. For this Purpose Mr. Strange relied upon Elsyn, Part 2. 103, 108. intituled *The anient Method of holding Parliaments*, and Mr. Justice Doderidge's Preface to another Book, called *The Opinions of certain Antiquaries concerning the Parliament*, printed 1658. To the other Question, with Regard to the bringing the Habeas Corpus, he said the Fact was by no Means made out that the Defendant brought it; according to their Instructions the Plaintiffs did it themselves; but if the Defendant had sued it out, he conceived that this would have been by no Means a Violation of his Privilege; because this might have been done to discharge him from his Imprisonment. And to the last Objection made to the Manner of taking Advantage of the Breach of Privilege, they conceived it to be a very proper one; for if the Defendant should be forced to take the other Methods that have been mentioned, the Time which is given for the Privilege would be a good deal spent, before the Party could have the Benefit of it. The Chief Justice thought this a Question of a good deal of Consequence; accordingly directed the Plaintiffs to make an Affidavit of that Fact, that the Habeas Corpus was sued out by the Defendant, if such a one they could make, and said the Court would take Time to consider of the Case. *Vide postea*.

Daunnage and Watkins.

When an Action of Debt is brought upon a Judgment pend- in Writ of Error, how far special Bail shall be necessary to be given, or not, in such Action.

THE Plaintiff having brought an Action of Debt upon a Judgment pending a Writ of Error, in which the Sum recovered in the original Action was but 3 l. 3 s. besides Costs of Suit. Mr. Dennison had obtained a Rule to shew Cause, why common Bail should not be excepted, and Proceedings said pending the Writ of Error. Mr. Strange came now to shew Cause, and said that if this had been a second Action brought upon the Judgment, he did agree that common Bail might be sufficient. But as this was only the first Action, he conceived that they were intitled to special Bail; and as to the other Part of the Rule, he said that there was no Reason for its being made absolute, unless it was consented that Judgment should be given in it to stand for a Security, in Case the first Judgment should be affirmed. With Regard to the first Part of

the

the Rule, the Chief Justice said, that as the Plaintiff could not have held the Defendant to Bail in the first Action, by Reason that the Debt was but 3 l. 3 s. he thought there was no Pretence for holding him to Bail in this neither. As to the last Part of the Rule, he took the Practice of the Court to be to grant Imparlances in these Cases from Time to Time, till the Writ of Error should be determined. The rest of the Court were of the same Opinion. Accordingly the first Part of the Rule was made absolute, and the last Part of it amended, by ordering Imparlances to be granted in the Manner mentioned by the Chief Justice.

Robinson *against* Lorkin and others.

Chanc. **R**OBERT PIERCE made his Will, and appointed two Persons his Executors, and gave to each of them a Legacy of 100 l. but directed that in Case one of them should refuse to act as executor, then he should not have his Legacy. As to the other, he directed that though he should refuse to act as Executor, yet still he should have his Legacy, so as he should be aiding in getting in the Testator's Effects. That Executor who was to have lost his Legacy in Case he refused acting in the Executorship, did act in it, the other Executor did not; but renounced the Probate of the Will; however at the Desire of the acting Executor, he did assist in getting in the Testator's Estate, and by his great Diligence did so much Service to it, that it appeared he deserved 500 l. for his Trouble. Upon a Bill of Account brought by the residuary Legatees against these Executors, it was insisted upon before the Master of the Rolls, that this Defendant, who had taken so much Pains in the Management of the Testator's Affairs, besides this Legacy of 100 l. ought to be allowed 400 l. more for his Trouble. However his Honour would not give him more than the Legacy, and decreed a general Account to be taken. Upon this an Appeal was brought before Lord Chancellor, and it was insisted on by the Attorney and Solicitor General, that by the Defendant's renouncing the Executorship, and assisting in the Management of the Testator's Affairs at the Request of the acting Executor, he appeared to act in this Affair as Servant to the other Executor; and therefore he ought to have been allowed what any other indifferent Person would. But the Chancellor said, that the general Rule of this Court was, that where a Trustee or Executor manage the Estate themselves, they shall not be allowed any Thing by way of Reward for their Trouble. That Rule he said he took to be so very right a one, that where two Trustees or Executors are appointed, and one of them refuses to act in the Trust or Executorship, he would not suffer it to be evaded by the acting Trustee's, or Executor's employing the other, under Pretence of a Servant. But the present Case, he said, was much stronger, for though this Defendant refused to act as Executor, yet by the Terms of the Will he might act as Assistant, and nothing appeared to him, but that he did so; accordingly the Decree was affirmed.

When a Sum of Money is given a Person for acting in any particular Matter, how far he shall not be intitled to Recover any greater Sum for his Extraordinary Care and Trouble.

The

The King and Refit.

What kind
of Fees shall
be said to be
due to the
Clerk of a
Market.

THE Defendant had been convicted upon an Indictment for taking 14 d. for examining, marking and sealing 14 Pint Pots, as Servant to one M^r. Robe, Clerk of the Market to the King's Household. M^r. Strange now moved in Arrest of Judgment, and said that it appeared by 4 Inst. 274. that the Fee of a Penny was due to the Clerk of the Market for marking and sealing a Pint Measure, so that there was no Offence laid in the Indictment. The Chief Justice said that the Court could not judicially take Notice, that the Fee of a Penny was due to the Clerk of the Market for this Part of his Office. Accordingly the Motion was refused.

Carey and Hilton.

Vide ante
363.

IN Trespass for breaking the Plaintiff's Close, called Bingsworth-field, the Defendant pleaded, that the said Close was the proper Land of the Defendant. The Plaintiff replied, that it was the Estate of Inheritance and proper Land of the Plaintiff, and not the proper Land of the Defendant. On Issue joined the Verdict found, that the said Lands were the Estate of Inheritance and proper Lands of the Plaintiff, and not of the Defendant. M^r. Kettleby had some Time ago moved in Arrest of Judgment, that this Plea of the Defendant, though intended to answer the Plea of Liberum Tenementum, yet was by no Means agreeable to it. He submitted it, that the Issue joined was really immaterial, and therefore the Plaintiff could not have Judgment upon it; accordingly he obtained a Rule, that the Plaintiff should bring in the Postea. The Postea being brought in, M^r. Strange argued a few Days ago, that this was only a Mis-pleading and cured by the Statute of Jeofails; for this Purpose he mentioned the Case of Yateman and Mustard, Trin. 1 Geo. 1. There in Trespass the Defendant pleaded, that A. was seised and demised to him, and laid a Que Estate for a Year; Verdict was given for the Defendant; in an Arrest of Judgment the Plea was held good, though only alledged in it, that the Defendant was seised without saying, that he was seised in Fee. To the same Purpose he cited 2 Bulst. 41. 5 Rep. 43. Salk. 365. and Yelv. 227. However at that Time the Rule was enlarged for staying the Judgment. M^r. Dennison argued on the same Side with M^r. Strange, and cited 3 Cro. 87. 2 Cro. 678. and 2 Saund. 217. The Chief Justice said he did agree, that the Plea was bad in it self, and might have been taken Advantage of on a Demurrer. For he took the Meaning of the Words in it only to be, That the Defendant had some Sort of Property in the Lands. However, as the Verdict has found that the Defendant had no sort of Property, he thought the Plaintiff must recover. Judge Page and Judge Probyn were of his Opinion. Judge Lee was of another Opinion. He said the Plea of Liberum Tenementum by constant Usage always sup-

posed in it a Right to the Possession, which this Plea by no Means does. And therefore he thought that a Verdict found in the Words of it could not make it good. Accordingly upon the Court's not agreeing in Opinion, the Matter stood over for a Day or two. Vide postea.

• Anonymus.

MR. Kettleby moved for a Mandamus to be directed to the Archbishop of Canterbury, requiring him to admit Mr. Austis to a Fellowship in All-Souls College in the University of Oxford. He said this College was founded by Archbishop Chichely, and the Statutes of the College provide, that the Election of the Fellowships shall be made on All-Souls Day, or within three Days after; that upon every such Election the Founder's Kinsmen shall be preferred before any other Persons. And in case the Fellows cannot agree to go to an Election within that Time, the Right of filling them up, shall devolve to the Archbishop of Canterbury for the Time being. He said there was a Vacancy before last All-Souls Day, and Mr. Austis, who was the Founder's Kinsman, offered himself a Candidate at the Election; but he was refused (the College omitting to fill up the Vacancy) and thereby the present Right devolved to the Archbishop. This Mr. Kettleby said was the State of the Fact; but he owned there was some Difficulty in laying it before the Court; for Mr. Austis has demanded of the College a Copy of the Statutes which they have refused him; so that he can only produce to the Court such a Copy of them, which he had from the Bursler of the College; however Mr. Austis swears he believes it was a true one. The Chief Justice said, that in the Case of Colleges that are of Royal Foundation he believed the Court has granted Mandamus's, where no Visitor is appointed, but in the present Case, which is of a private Foundation, he believed it might be a Doubt, whether a Mandamus could go, though it should be admitted, that no Visitor was appointed by the Statutes. However he thought at present the Court could not inquire into that Matter, by Reason that no attested Copy of the Statutes was then before them. In the Case of Sir Edward Seymour, where an Original Deed was in the Adversary's Hand, and he would not produce it, he did agree, that parol Evidence was allowed of it; but then it was from one who had read the Deed itself, which is not pretended to be in the present Case. He said it was certain, that this Court could not grant a Rule for the Inspection of them, till there was a Cause in Court between Mr. Austis and the College; and even then it might be a Doubt, whether they could do it. However he did think that the Party might have a Sight of them in Chancery by bringing a Bill of Discovery; and till that was done, this Court could do nothing in the Affair. The Rest of the Court were of the same Opinion; accordingly the Motion was refused.

How far a Mandamus will lie, or not, to admit a Person to a Fellowship.

Heblethwate *against* Cartwright and others.

How far a
Portion shall
be raised, or
not, by the
Sale of a Re-
versionary
Term.

Canc. James Heblethwaite being seised of certain Lands in Fee-
Simple, made a Settlement of them to the Use of
himself for Life, the Remainder to his Wife for Life, the Re-
mainder to the Heirs of the Body of Charles hereafter to be
begotten, and in Default of such Issue the Remainder for a
thousand Years to certain Trustees for raising Portions for
his Daughters, viz. for raising the Sum of 5000*l.* in case he
should have three Daughters, and so in Proportion should he have
more or less, equally to be divided between them at their re-
spective Ages of 21 or Day of Marriage, which should first hap-
pen; the Remainder to his Brother Charles Heblethwate for
Life, and after his Decease to the Heirs Male of his Body here-
after to begotten. In this Deed of Settlement there were two
Provisoes; one was, that the Trustees should raise this
Money for the Daughters Portions by the Rents and Pro-
fits, or Sale and Mortgage during the Term; the other was,
that if James Heblethwate their Father or any of the Remainder-
men should give an Equivalent to any of the Daughters, that
then their respective Portions should not be raised in the
Manner that has been mentioned. Margaret the Wife of James
Heblethwate died without Issue Male, leaving three Daughters,
each of which were married at the Time of her Death. Charles
Heblethwate had Issue one Son, named William, born at the
Time of the Settlement, but had no other Children afterwards.
William had Issue a Son, who after the Death of James Heble-
thwate brought his Bill in this Court against the three Daugh-
ters, to have a Decree made of this Estate, in Pursuance of
the Settlement. The Defendants insisted upon two Rights; in
the first place, that they were intitled to the Estate; secondly,
admitting that they were not, that still the Estate was charge-
able with their Portions, and the Interest thereof due from
the Death of their Mother. With regard to the first of these
Matters Lord Chancellor said, that the Difficulty arises from
the Limitation in the Settlement being to the Heirs of the Body
of Charles, hereafter to be begotten; but yet he did think that
this was an Estate-Tail general in Charles; that William himself
would have been intitled to it, and consequently that the
Plaintiff was so likewise. He said Lord Coke's Opinion was,
that a Limitation in a Deed heredibus procreatis or procreandis was
all one, and Mr. Bootle had cited a Case 24 Edw. 3. 28. Pasch.
15. where the Words hos procreaverit were held to be the same;
and if the Words had been already begotten, Lord Chancellor said
he should have thought that the Heirs of the Body born af-
terwards would have taken likewise. With regard to the se-
cond Question he said, that it was objected by the Plaintiff,
that the Interest of the Daughters Portions ought not to com-
mence barely from the Death of the Mother, but from the
Death of the Father likewise; and to support the Objection,
the two Provisoes in the Settlement are relied upon. By the
first of them it is contended, that the Words are during the
Term,

Term, and till that falls into Possession nothing is to be raised; by the second, that the Father had all his Life-time to offer the Daughters an Equivalent for their Portions. But his Lordship observed, that where a certain Day is appointed for Portions becoming due, nothing was more certain, than that Reversionary Terms might be sold before they fell into Possession; and that though there is no express Clause or Sale to warrant it; and as to the other Proviso, that was only in the Nature of a Power of Redemption. Accordingly a Decree was in Favour of the Plaintiff; but subject to his allowing the Daughters Portions, and Interest of 4 per Cent. to be computed from the Death of the Mother.

The King against Scolden and others.

ON Rule to shew Cause, why Informations in the Nature of Quo Warranto's should not be granted against the Defendants, for exercising the Office of Capital Burgesses and other Offices in the Corporation of Orford; Mr. Draper said, that with regard to some of the Defendants, he should not oppose the Rule's being made absolute; but as to Scolden and Brady he submitted it, the Rules ought to be discharged. With regard to Mr. Scolden, he said, the Charge upon him was for acting as Mayor; and he could not deny but there were two Entries made in the Corporation Books, that he had acted in that Capacity. But those Entries were made by meer Mistake. With regard to Mr. Brady the Charge was, that he acted as Capital Burgess after he left off residing within the Borough, and the Words of the Charter are, That no Person shall continue a Capital Burgess longer than he is an Inhabitant within it. He said he should not contend but Mr. Brady chiefly resided in a Village near adjoining. But he had many Affidavits to shew, that Mr. Brady occupied a House within the Borough, which was let out partly to Lodgings, and the other Part was in his own Hands, that he was rated for this House, and Churchwarden this very Year. Mr. Thurston on the same Side said, that he submitted it, that a Person might be an Inhabitant in two Places at one Time; for which Purpose he cited 5 Rep. 67. and 2 Inst. 173. Mr. Abney argued on the other Side, and said that he should not contend but that the Occupying Land or a House in a Parish would to some Purposes make a Man an Inhabitant, but conceived that Residency was essentially necessary in the present Case; and for this Purpose mentioned the Case of the Borough of Radnor, where the paying Taxes for Land was held not to be sufficient. The Court said, that it was only sworn in the Affidavits, on which the Rule was obtained, that Mr. Brady resided in this other Village, without any Negative Words as to his residing within the Borough; and they thought it sufficiently appeared by the Affidavits on the Part of the Defendants, that Mr. Brady was to be considered an Inhabitant in this Borough within the Intent of the Charter. And the Chief Justice said, in the Case of Sir William Lowther, the Court refused granting

How far a Person shall be a sufficient Inhabitant to be capable of being chosen a Member of a Corporation.

granting an Information against him for exercising an Office in the Borough of Pomfret, though it appeared that he took a House in the Borough to qualify himself only the Day before the Election. He said likewise, that there was no Pretence to make the Rule absolute as to Mr. Scolding. Accordingly the Rules relating to him and Mr. Brady were discharged.

The King *and* Elmes.

Vide ante
484

MR. Hussey moved to amend a Plea to an Information in the Nature of a Quo Warranto, though after a Confilium; and a Rule was made to shew Cause. Vide postea.

Den and Perry *against* Mullens.

How far a
Court of Law
will not al-
low that one
Person shall
defend a
Suit with an-
other.

Corteseo having been in Custody of the Defendant, the Marshal of this Court, gave a Bond to him of Indemnity to have the Benefit of the Rules; but after this there was a Pretence of his having made an Escape, and it was said that there was a Contrivance between the Marshal and the Plaintiff, at whose Suit Corteseo was in Custody, that this Action should be brought against the Defendant; that the Defendant would let Judgment go against him upon it, and then would give this Judgment in Evidence in an Action brought upon the Bond of Indemnity. Upon this Mr. Marsh moved, that the Defendant might permit Mr. Corteseo to defend this Action jointly with him. He said this was in itself a reasonable Motion; but more especially as the Defendant was an Officer of the Court. The Chief Justice said, that Motions of this Sort are admitted sometimes in Chancery; but he believed never in a Court of Law. The rest of the Judges were of the same Opinion; accordingly this Part of the Motion was refused. However there being another Part of it with regard to a Complaint against the Marshal for taking a Sum of Money of Mr. Corteseo against the Duty of his Office; the Court made a Rule upon him to shew Cause as to that.

The King *and* The Justices of Peace of Shrewsbury.

Vide ante
324.

MR. Abney came now to shew Cause, and said that the true Reason for the Court's refusing a Certiorari in the Case of Utoxeter was, that if the Rate should be removed up the Poor would be left starving, which he said held in the present Case equally as in that. Judge Probyn and Judge Lee declared that that was the true Reason of that Case; accordingly the Rule was discharged.

Anonymus.

MR. Pilsworth moved for a Mandamus to be directed to the Justices of Peace in Berkshire, requiring them to hold a Court of Conservancy, in Pursuance of 17 Rich. 2. 9. for that Part of the River of Thames which lies in their County. But the Chief Justice said, that if there are any Complaints concerning these Rivers, they are to be made at the ordinary Court of Sessions by the Words of this Statute, and no particular Court of Conservancy is appointed by the Act for this Purpose. Judge Lee said, that the Court in London is created by Charter given to the City; accordingly the Motion was refused.

How far a Mandamus will not lie, in order to require Persons to hold a Court of Conservancy relating to the River Thames.

Kent and May *against* Kent.

THE Chief Justice delivered now the Opinion of the Court upon this Record; he said the single Question which remained as a Doubt with them was, with Regard to the Damages allowed upon the Affirmance of the Writ of Error, from the Time of the Judgment given in the Common Pleas in Ireland to the Time of that Affirmance, and likewise with Regard to the Costs given upon the Writ of Error in the King's Bench there. As to that, he said three Questions were to be considered; First, whether the Court of King's Bench below ought to have given any such Damages at all. Secondly, admitting that they should, whether these Damages were rightly given against one of the Plaintiffs in the present Writ of Error. Thirdly, Supposing that they were not, whether this Error can be taken Advantage of by both the Plaintiffs joining in the Assignment of it. With Regard to the first of these Questions, the Court were of Opinion, that such Damages ought to be given; however not upon the Statute of Merton, but upon that of 16 & 17 Car. 2. 8. (4.) which Statute was enacted in Ireland the Year following. But with Regard to the second Question, they were of Opinion that the Damages ought to have been given against them both jointly. The Chief Justice did own, that as it appears upon the present Record, that the Ancestor of one of the present Plaintiffs was alive some Time after the Judgment given in the Common Pleas, it might seem a little hard, that the Heir of that Party, who is one of the present Plaintiffs, should answer for that Part of the Damages incurred between the Time of the first Judgment and that of his Ancestor's Death; but yet as the present Case is, he must answer for that Part of them as well as for the other incurring to the Time of the Affirmance of the Judgment; and this by the Statute of 16 Car. 2. which has been mentioned. For by that Statute, undoubtedly he must join in the Recognizance with the other Plaintiff, and by the Words of it must be subject to satisfy the Damages likewise. He observed farther, that the Court were of Opinion, that these

Vide antea 386.

Damages were not rightly given for another Reason, namely, because no Writ of Inquiry was awarded, in order to ascertain them. He did agree that it might be objected that this was not necessary; because the annual Value of the Lands is ascertained by another Part of the Record; so that it may be said that there is only Occasion for the Court to increase these Damages in Proportion; but the Statute last mentioned required this; and therefore it ought to have been done. And this distinguishes the present Case from that upon the Statute of Merton; for there, though Damages are given, the Method of ascertaining them is left to the Discretion of the Court; and the general Rule observed by them, has been not to grant a Writ of Inquiry, where the Damages are either admitted by the Party, or ascertained by the Jury, after giving their Verdict; but in other Cases to grant it. To this Purpose he cited 1 Lev. 92. 1 Lutw. 719, and the Case of Burden and Burden, Pasch. 3 Will. 3. Rot. 393. This therefore shews that the present Case is distinguishable from the others, and there might be some Reason for the Statute of Car. requiring this; because the Value of Land many Times changes. To the third of these Questions he did agree that the general Rule of Law was, that the Person shall not be allowed to assign a Matter for Error, which is for his Advantage; and for this Purpose he cited 2 Cro. 92. 3 Cr. 891. Yel. 3. and Saund 239. but this Rule does not hold where the Error is in the final Judgment of the Court; and for this Purpose mentioned 8 Rep. Beecher's Case and Rol. Ab. 765. This Part of the Judgment therefore with Regard to the Damages must be reversed; and so must that with Regard to the Costs; upon the Affirmance of the Judgment laid upon one of the Parties likewise. But then he said it would be proper to consider in what Form the Judgment should be, which this Court ought to pronounce. And here though the general Rule is, that the Court above must pronounce the same Judgment, which the Court below ought to have done; and for this Purpose he mentioned 1 Cro. 442, 511. and 2 Cro. 554. yet in these Cases of Writs of Error into Ireland, this Rule does not always hold. And in the present Case, he said this Court could not direct a Writ of Inquiry to the Sheriff of Kilkenny, which is the County where the Lands lie. But they can only order the Court below to issue such Writ, and that they take Care that Execution be done upon it. This is the same Method as is taken in Writs of Error brought in the Exchequer-Chamber on Judgments of this Court; and for this he cited 2 Cro. 206. Yel. 74. and Car. 180. Accordingly the Judgment of the Common Pleas in Ireland was affirmed in the whole of it; and likewise that Part of the Judgment of the King's Bench there, which affirmed the Judgment of the Common Pleas, together with the Award of Seisin upon it, ordered by the King's Bench, reversed the other Part of that Judgment with Regard to those Damages and Costs, and directed the Court of King's Bench below to award the Writ of Inquiry, with Execution upon it in the Manner that has been mentioned.

Cumber and Hill.

THE Chief Justice now delivered the Resolution of the Court upon this Record; and said they were unanimously of Opinion, that in this Case no Cross Remainder ought to be allowed. He said the general Rule in these Cases is, that no Estate shall arise, but where there is an express Declaration of the Party, or a strong Implication to that Purpose. But neither of these was in the present Case; for the only Words that give here any Colour of Doubt, are those, and for Default of such Issue. But those Words may well refer to the Word Respective, as well as to the other Words in the former Sentence; and if so, the Lessor of the Plaintiff is to take after either of the two other Grandchildren dying without Issue respectively; and as the Plaintiff was of equal Degree of Kindred to the Testator with their Brother and Sister, this much confirms this Construction. The only material Case that seems of any Weight against this Opinion, was the Case of Homes and Meynel, reported in Sir Thomas Jones 172. and in other Books. But this Case materially differs from that in many Respects; for there the Words are, if they die without Issue, which something implies, that both of them are to die first; likewise there was the Word all, which intimates that the Lands were to go all together; so there was not the Word Respective, and the first Devisee was the Testator's Daughter, the Remainder-man only a Nephew. He said likewise, this Circumstance of Difference in Kindred distinguished the present Case from that in Dyer 303, 326, and 4 Ley. 14. Accordingly the Court gave Judgment for the Plaintiff.

Dobson and Dobson.

THIS Matter now coming on again, Mr. Strange argued for the Plaintiff in Error; he submitted in the first place, that Damages ought not to have been given at all; for this does not appear to be a Writ of Dower unde nihil habet; the Word Unde being omitted, and Damages are given in no other Writs of Dower, according to Co. Lit. 32. b. He said farther, that these Damages are given in the present Case a morte viri, whereas they ought to have been given only a die Impretationis brevis; for the Demandant herself neglected a long while bringing this Writ (her Title of Dower accruing in 1725, and this Writ being brought only in the second Year of the present King) and she ought not to take Advantage of her own Laches. He observed likewise, that the Damages were given too far, for they are given to the Time of taking the Inquisition, after the first Judgment by Default; and they ought to have been given no longer than to the Time of that Judgment; for that is such a one upon which Error might be brought. He took Notice likewise, that the Judgment by Default was not rightly entred; for there were four Tenants, and yet the Entry is quod ipse solemniter

lemniter exact' non vern'. And lastly, he concluded, that there was no Day given to the Demandant upon the Writ of Inquiry, which ought to have been, according to Carthew 173. and so there was a Discontinuance. Mr. Parker argued on the other Side, and said that if the Party would take Advantage of this Defect in the Writ, which has been mentioned, he ought to have removed the Writ up by Certiorari. Then as to the Time from which the Damages are given, they are always computed a morte viri; and this by the Statute of Merton. So by Construction upon this Statute, the Damages have always been given to the Time of the final Judgment; and to this Purpose is Leo. 56. and the Case of Spiller and Andrews, Hill. 8 Geo. 1. And as to the Judgment by Default, he submitted it, that this could only be said to be defective Latin, and might be made good. To this Purpose was the Case of Peach and Chapfield, Mich. 4 Geo. 1. That was an Action against several Defendants, and they had concluded their Plea with hoc parat' est verificare. The Court was of Opinion in that Case, that the Plea was well concluded, and said that they would understand the Words Illis. In that Case the Case of Hales and Owen was cited too, where the Words were, quod breve Domini Regis emanavit, per quod Præcepit; and there the Court said that they would understand the Words Dominus Rex before the Word Præcepit. Then as to the Discontinuance, he conceived that there was none. He said that the Precedents are constantly in this Manner; and cited to this Purpose Rast. 238. b. Pla. 16. Co. Ent. 181. 1 Brown. Ent. 222. and Rob. Ent. 221, 243, 254. But if this was any Discontinuance, it was cured by the Statute of 4 Ann. 16. for that Statute extends to all Cases, where there is to be a Writ of Inquiry; and for this Purpose he cited the Case of Henwrikes and Atkins, Hill. 10 G. 1. That was a Writ of Error in the Exchequer Chamber, and a Defect in the Judgment given on Demurrer, which was held to be cured by that Statute for this very Reason. The Court declared themselves satisfied with the Answers to all the Exceptions, excepting that of Judgment by Default; but as to that they inclined to think that the Exception was fatal; because it did not seem to them that the Words could be construed in any other Sense, than in the singular Number. Upon which Mr. Parker submitted it, that the Word Ipse being writ in Court-hand, might be read Ipsæ, there being no Diphthongs in that Word, that this will be only false Latin, and the rest of the Words being writ with Contractions, that they will serve for the plural Number as well as the singular; and the Matter stood over. Vide postea.

When a Scire facias is brought upon a Recognizance of Bail, how far the Recognizance shall be said to be rightly described in it, or not.

Cowper and Mapson.

IN a Scire Facias against Bail, to which there was a Demurrer, Mr. Dennison submitted it, that the Recognizance was set forth wrong; for it was, that if one Solomon Smith should not happen to pay the Condemnation Money, or not surrender himself, &c. whereas it should have been that if he should happen not to pay; and then the Words not surrender would be right. The Chief

Chief Justice thought this an Exception of some Weight; accordingly the Matter stood over. *Vide postea.*

The King *and* Ellams.

MR. Abney came now to shew Cause, and said that if this Amendment should be allowed, it would alter the very ^{*Vide ante*} Substance of the Defendant's Plea. He observed, that this ^{402.} was an Information in the Nature of a Quo Warranto brought against the Defendant for exercising the Office of Mayor in the City of Chester. To this Information the Defendant pleads, that by the Charter two Persons are to be nominated by the Mayor and Aldermen out of the Citizens of the City, Suburbs and Hamlets there adjoining, and that the Mayor for the Year ensuing is to be chosen out of one of them. And the Defendant avers, that he was nominated out of the Citizens and Inhabitants of the City together with another, and that he was duly elected out of one of them, according to the Form of the said Charter. To this Plea there was a General Demurrer. M^r. Abney said, that the Plea was certainly bad in Substance; for by the Charter the Defendant confesses that the Nomination is to be out of the Citizens of the City, Suburbs and Hamlets; and yet he alledges that his Nomination was out of the Citizens of the City only. The Defendant has joined in Demurrer upon this Matter. And the Record actually made a Confilium. And therefore, if there was no other Objection in the Case than this, he submitted it, that was sufficient to shew, that the Amendment ought not to be. He said likewise, that the Prosecutor had lost a Trial; for this Record was carried down at the last Assizes upon an Issue to try, whether the Defendant was Alderman at the Time of his Election to be Mayor. The Demurrer was joined even at that Time; but that Issue was not tried, the Prosecutor relying upon this Mistake. He observed farther, that he was far from being certain, that this was not to be considered as a Criminal Prosecution, for on Motion for a new Trial in an Information of this Sort the twelve Judges were equally divided in Opinion; and a new Trial could not be had. M^r. Strange and some other Counsel argued for the Defendant. They said they did conceive, that especially since the Statute of 9 Ann. 20. this was a good deal to be considered as a Civil Suit. And as to the Loss of the Trial upon this Account, they said the Fact was plainly otherwise; for the Reason of this Information's being not tried was merely upon the Prosecutor's being apprehensive that the Defendant would take the same Challenge in this Information, which had been taken in another of the same Sort before. Of this Fact they could easily procure an Affidavit; and so they could, that the Fault in the Plea was not owing to any Design, but meerly to a Mistake; and they said that after a Demurrer the Court has often allowed of Amendments. For this Purpose they mentioned the Case of Wilks and Rich, Mich. 9 Ann. where an Amendment was allowed after a Demurrer and even Argument had in the

Paper. So in the Case of the Town of Malmesbury, Easter 9 Ann. that was an Information in the Nature of a Quo Warranto; there happened to be there a Mistake in the Name of the Corporation; a Demurrer on that Account; and even after Argument, Amendment allowed. And Mich. 12 Anne, there was the like Information relating to the same Town of Malmesbury, Issue taken upon Non usurpavit, in the Postea the Issue was entered Non Cul', and the Postea amended Hil. 12 Geo. 1. in the Case of Ballam and Hareford, the Defendant's Plea concluded to the Country, where it should have concluded with an Averment; there was a Demurrer and Joinder in Demurrer on this Account; and yet after that it was amended. So the next Term in the Case of Crockat and Jones, the Plaintiff in replying to a Plea of the Statute of Limitations had omitted setting out the Continuances of the Writ, which he served out to take the Case out of the Statute; yet there even after Argument upon Demurrer the Court gave Leave, that the Continuances should be entered. In the Case of The King and Hughes, which was an Information in the Nature of a Quo Warranto for exercising the Office of Mayor of the Town of Liverpool; the Defendant set forth in his Plea, that the Mayor elect ought by the Charter to be sworn before the late Mayor, and two of the Bailiffs; and he averred, that he was sworn before the late Mayor, Peter Wirseild one of the Bailiffs and another Bailiff. But by Mistake Wirseild's Christian Name was mistaken, for it was Robert and not Peter. The Record was set down to Trial with this Mistake in it. Upon this there was Application to Lord Raymond at his Chambers in Hil. Vacation 1727, that they might have Liberty to make up a new Record of Nisi prius; and on hearing Counsel he directed, that it should be so, and provided this Record could be sent to the Assizes before the Cause was tried upon the other, that the Cause should be tried upon this Record and not upon the other. Accordingly a new Record of Nisi prius was made up, sent down by an Express to the Assizes, got there before the Cause came on, and the Cause began to be tried upon that Record; but upon a Challenge being taken the Cause was withdrawn by Consent. So in the Case of Morton and Tutrey, Mich. 3 Geo. 2. in the Court of Exchequer, that was an Action for erecting a private Nuisance. In Trin. Term before there was a Demurrer to the Declaration for false Latin, and a Joinder in Demurrer, yet in Mich. Term following the Court allowed the Demurrer to be withdrawn on pleading an issuable Plea, though it was urged there that the Party had lost the Benefit of a Trial: and to the same Purpose they cited the Case of The King and Hays, Vol. 2. 142. Hutton and Walker, Vol. 2. 220. Dummoland Aldworth, Vol. 2. 291. The King and Charlesworth, Vol. 2. 363. and the Case of the Dutchess of Marlborough, Vol. 2. 418. and farther relied upon 1 Cro. 144. 1 Show. 273. 2 Mod. 167, and 3 Lev. 347. The Chief Justice said, that as this is an Annual Office, it would be a Thing of dangerous Consequence to allow an Amendment of this Sort as a Thing of Course, without laying a proper State of the Fact by Affidavit. For if so, it would be in the Power of such Officer at any Time to hold his

his Office out, before Judgment could go against him; and therefore he thought the present Rule should be discharged; giving the Defendant Liberty to move this Matter again upon proper Affidavits. The rest of the Court were of the same Opinion. Accordingly this Rule was discharged, and the last Day of the Term two Affidavits were laid before the Court; one, that the Trial did not go on merely on Account of the Challenging; another that this Fault in the Plea was owing merely to an Oversight in the Counsel, and upon that the Court made a new Rule to shew Cause, why the Plea should not be amended. *Vide postea.*

The King and Witchurch.

Serjeant Birch moved to quash a Mandamus requiring a certain Mayor to deliver Books over to a Town-Clerk. But the Day of the Return being out, the Court refused to do it. And Judge Lee said the like Motion was refused in the Case of The King against The Mayor and Justices of Wallingford.

How far the Court will not quash a Mandamus, by Reason that the Return Day is expired.

Anonymus.

MR. Parker moved for a Certiorari to be directed to the Justices in the Commission of the Old Bailey to remove up an Indictment for Perjury. He said he owned that this Application was made on the Part of the Defendant; but yet as this was only a Misdemeanor, he submitted it, his Motion was regular, and said he apprehended a like Motion was granted in the Case of The King and Forrest; and the Reason he took to be, that the Judges seldom attend there after the Trials of the Felons are over. But Judge Probyn said, the last Time he attended at the Old Bailey he heard two Indictments for Misdemeanors himself. And Judge Lee said he remembered the like Motion was refused in the Case of The King and Lady Blunt. Accordingly it was refused in the present Case.

How far a Certiorari will not lie to the Old Bailey in order to remove up an Indictment for a Misdemeanour.

The King and Pool.

J. L. Rep. B. R. Simp. H. 23.

THE Defendant having obtained a Rule, that Judge Lee would speak with Judge Fortescue concerning the State of the Evidence in this Cause that was tried before him, Judge Lee reported the State of the Fact in the Manner following. This was an Information in the Nature of a Quo Warranto granted against the Defendant for exercising the Office of Mayor in the Borough of Liverpool. Four Issues went down to be tried, and the Judge was satisfied with the Verdict on three of them; the fourth Issue was, whether the Defendant was duly elected. The Evidence on that Issue appeared to be, that the Charter-Day for the Election was St. Luke's Day the 18th of October; there was a good deal of Disorder upon this Election

How far the Court will grant a new Trial, by Reason of the Jury's finding a Verdict contrary to the Direction of the Judge.

Election on that Day; accordingly by Consent the Poll was adjourned till eight of the Clock in the next Morning; then the Poll went on, and the Defendant had the Majority of Votes. Upon this Evidence the Judge directed the Jury to find a Verdict on this Issue for the Defendant; but they found it for the King. Upon this State of the Case Mr. Abney said, that he conceived that he was intitled to pray, as a Thing of Course, that a new Trial might be granted. And so he said in the Bewdly Case, which was even a Trial at Bar, where the Court directed the Jury to find a Verdict specially, and they found it generally; eleven Judges were of Opinion against one, that a new Trial should be granted; and a new Trial was granted accordingly. Mr. Strange and others of Counsel on the other Side said that they should not contend but the general Rule was as has been mentioned. But in the present Case, they said the Adjournment of the Poll appeared upon the Record; and as it did so, they conceived that by the Record the Adjournment appeared to be illegal; and no Consent could make it good; because on the Charter-day the Office of the precedent Mayor absolutely determined; and they should have submitted it to the Court that this Case was not within the Benefit of the Statute of 11 G. 1. which allows of Adjournments in certain Cases. The Court thought this a Question proper to be considered of; accordingly the Rule for granting a new Trial was enlarged till the next Term. *Vide postea.*

Hollowday and Pit.

Vide antea
422.

THE Chief Justice said now, that all the Judges of England, excepting Mr. Baron Carter, had met upon the Consideration of this Case; and their unanimous Opinion was, that even after a Dissolution, the Members of the precedent Parliament are intitled to some Privilege in returning to their respective Places of Abode; what Time that Privilege was confined to there was no Occasion to determine; because supposing the Time of Privilege to be only a convenient one, their Opinions were, that the Defendant had not even that convenient Time allowed him; he being taken in Execution within three Days after the Prorogation, and two Days after the Dissolution. The great Question which they doubted upon was, whether the Method, which the Defendant had taken to obtain his Discharge out of Custody, was a proper one, or not. As to that, he said all their Opinions were, that if the Defendant had sued out a Writ of Privilege under the great Seal, that would have been a proper one; whether this was so, or not, the Judges differed in Opinion. Accordingly the Resolution of this Court was, that this Rule should be enlarged till the next Term, that they might have an Opportunity for considering more fully, whether this was a proper Method, or not; and in the mean Time the Defendant should have Liberty given him to sue out a Writ of Privilege, if he thought proper. *Vide postea.*

Cary and Hilton.

THE Chief Justice now delivered the Resolution of the Court in this Matter; he said they all agreed that this Plea would have been bad upon a Demurrer; and so if the Jury had found that the Lands were the proper Lands of the Plaintiff, and not of the Defendant, this Verdict possibly would not have made it good. But as they have found that this is the proper Estate of Inheritance in the Plaintiff, they thought it had made it good; because otherwise the Court must intend a particular Estate in Somebody else; and to this Purpose the Chief Justice mentioned the Case in 1 Vent. 123. and that of Yateman and Mustard before cited. Accordingly the Rule was discharged for arresting the Judgment.

Vide antea
363.

Devenish and Martin.

THE Chief Justice delivered now the Resolution of the Court in this Matter, which was, that as this was a Discontinuance, the only Method of obtaining double Costs was by Rule of Court. The Chief Justice said that none of the Statutes give single Costs in these Cases of Discontinuances; but they are only given by the Court, as Terms which they put upon the Party when he moves to Discontinue. And therefore as single Costs are only given by Rule of Court, the double Costs ought to be given in the same Manner. Accordingly that Part of the Rule which related to the Suggestion was discharged, and the other Part, which related to the Master's Allowing double Costs, was made absolute.

Vide antea
373.

The King and Brooks.

ON Rule to shew Cause why the Defendant should not have a Copy of the Venire and Distringas, Mr. Strange said that this was an Information in the Nature of a Quo Warranto, brought against the Defendant for exercising the Office of Bailiff in the Town of Liverpool. This Cause he said was tried in the County Palatine of Lancaster, and was sent down by Mittimus; and the Venire and Distringas both issued out of the Court below; therefore these Writs are not to be filed in this Court, and consequently this Court cannot give the Party a Copy of them. In the Case of The King and Franklin, Vol. 1. 37. Motion was made that the Postea might be filed together with the Venire and Distringas, in order that the Party might have Copies of them. But even there the Court was of Opinion that the Postea and Distringas ought to be filed, tho' it was agreed that the Venire should not. The Chief Justice said that where any Motion is intended to be made on the Plea Side, a Rule is drawn up upon Motion that the Plaintiff's Attorney shall at-

When a Record is sent down by Mittimus, in order to be tried in a County Palatine, how for the Court above cannot give Copies shall be taken of the Venire or Distringas.

tend with the Postea; in the Crown Side the Form of the Rule in such Cases is, that Proceedings shall be staid till the Parties bring the Postea into Court. In neither of these Cases the Party has a Liberty given him to take a Copy of the Postea; but the Party has a reasonable Time allowed him for looking into the Postea, and examining it. The rest of the Court were of the same Opinion; accordingly the only Rule that they made was, that the Postea should be brought into Court. Vide postea.

Caswell and Norman.

When a Writ of Error is brought by an Executor, how far he shall pay Costs, or not.

MR. Denhison moved that the Court would give Directions to the Master to allow Costs against an Executor, upon a Writ of Error brought by him on a Judgment, charging him with a Devastavit. Mr. Parker argued on the other Side, and said he should not contend but in Cases of this Sort Executors must put in Ball upon Writs of Error; and so is 1 Sid. 368. but the Statute that gives Costs upon Writs of Error, he conceived, did not extend to Executors; because they do not pay Costs upon the original Judgment. The Chief Justice said that it was true indeed, that Plaintiffs Executors do not pay Costs upon the original Judgment; but it has been always held that Defendants Executors do. The same Distinction he thought ought to be observed upon Writs of Error; especially as in the present Case the Executor is found to be guilty of a Devastavit. The rest of the Court agreed with the Chief Justice; accordingly Directions were given to the Master to allow the Defendant in Error his Costs.

Neal and Peisely.

When a Declaration is delivered against a Prisoner in Custody, how far the Defendant is obliged to plead, or not, within eight Days.

THE Defendant was arrested by Process returnable the first Return of this Term, and upon that was committed to the County Gaol of Northumberland. The Plaintiff's Attorney delivered a Declaration to him in Custody before monsem Pasche; and because the Defendant did not plead in eight Days signed his Judgment. Upon this it was referred to the Master to inquire into the Irregularity of this Judgment; and now he reported the fact to be in the manner that has been mentioned; but with this additional Circumstance, that there was no Notice to plead within the eight Days annexed to the Declaration. Mr. Agar argued in Support of this Judgment. He said he should not contend but if the Rule of Court that was made to establish the Practice upon 4 & 5 Will. & Ma. 21. now published, the Judgment was irregular. But he submitted it, that the late Rule made in 3 Geo. 2. for altering the Time for pleading, extended to Prisoners as well as other Persons, and thereby the first Rule was no longer in force. The Chief Justice said that he should have much inclined to have been of Opinion that the last Rule did not extend to Persons in Custody; but there was no Occasion to give an Opinion upon that Point; because the

the proper Notice was not annexed to the Declaration; and therefore the present Judgment must have been Irregular, if it had depended merely upon this Rule; accordingly the Judgment was set aside with Costs.

Jennings and Kerridge.

MR. Harvey moved that the Defendant might be at Liberty to enter up a Judgment as of 5 Geo. 1. upon Notice of the Motion given to the Defendant. The Chief Justice observed that this might be dangerous on Account of Purchasers; upon which M^r. Harvey said that he was willing to enter into a Rule of Court that the Judgment should not be docketed but of this Term. The Chief Justice said, that still the Plaintiff would have it in his Power to docket it as of the Term it was entered up in, and it would only be Contempt of the Court; for this Reason the Motion was refused.

How far the Court will give Liberty, or not, that Judgment may be entered nunc pro tunc.

The King and Winnyat.

MR. Strange took several Exceptions to an Order of Sessions made upon the Defendant to pay 30 l. Wages to his Servant; First, that none of the Justices appeared to be of the Quorum. Secondly, that the Sessions are said to be held for the County, and not in the County. Thirdly, that the Service does not appear to have been performed in the County. And lastly, that the Defendant does not appear to be of the County. Accordingly a Rule was made to shew Cause; and the next Term the Rule by Consent was made absolute.

When an Order is made for Payment of Servants Wages, how far such Order shall be said to be good, or not, in Point of Form.

The King against Friend and his Wife.

THE Defendant having been convicted upon the Statute of 10 Geo. 1. cap. 10. for beating Excise-Officers in the Execution of their Office; M^r. Lacy moved in arrest of Judgment, that there were distinct Penalties given of 50 l. the one on the Wife, the other on the Husband; whereas one Penalty of 50 l. ought to have been inflicted upon the Husband only. Accordingly a Rule was made to shew Cause. Vide postea.

When Persons are convicted upon the Statute of 10 Geo. 1. cap. 10. to prevent the Beating an Officer of the Excise,

how far there shall be distinct Penalties given upon that Statute, or not.

Banghan *against* Lothar and others.

When an Action of Trespass is brought for the taking of Goods, how far the Defendant may be allowed to prove a Title to those Goods under an Execution, notwithstanding he has pleaded the General Issue.

Sittings at Guild-Hall. **I**N Trespass brought against the Defendants for taking away Goods, the Plaintiff proved his Possession in them as Trustee for one Davis, upon a Writ of Execution, marked for 300 l. against the Goods of Atchenson. Atchenson had confessed a Judgment for 600 l. to Davis, and a Writ of Execution which was marked for 300 l. came to be levied upon Atchenson's Goods the 5th of November last. The Sheriff's Bailiff upon the Execution levied but 88 l. 4 s. and returned this upon the Writ. As soon as this Execution was so made, a Bill of Sale was made of the Goods to the Plaintiff, in Trust for Davis, but Atchenson's Wife continued in Possession of these Goods, and carried on the Business of the House, her Husband being gone off. On the Part of the Defendant, Serjeant Darnel at first only endeavoured to shew that the Plaintiff had not such a Possession in these Goods by this Means, as to be able to maintain Trespass; and thought he could not be allowed to shew a Title to them under another Judgment and Execution, in as much as the Defendant had pleaded generally Not guilty. But the Chief Justice said the Defendant might be admitted to give this Evidence upon this Issue, in as much as this is only a Dispute about the Right of those Goods between two Judgment-Creditors; though he did agree that if this Action had been brought by Atchenson himself, the Defendant must have justified the Taking specially. Upon this the Serjeant went into the other Part of his Evidence, and shewed a Judgment by Default obtained by Lothar against Atchenson, and a Writ of Inquiry, ascertaining the Damages to 17 s. 10 d. And upon the 3d of December an Execution was made upon the Goods in the Hands of the Wife of Atchenson. Mr. Marsh by way of Reply shewed, that Davis had at several Times assisted Atchenson with Sums of Money, that at the Time of the Execution there was at least 86 l. bona fide due to Davis; that Atchenson had been an absconding Man for some Time; and that before and after the Execution, several Persons had sent Goods into the house upon the Credit of Davis, believing that Atchenson's Wife acted only as Servant to him. The Chief Justice in summing up the Evidence said, that if any open Agreement could have been proved at the Time of the first Execution, that Atchenson's Wife should continue in the Possession of the Goods, as Servant to Davis, to make a farther Improvement of them for his Benefit, he should have thought the Verdict ought to have been for the Plaintiff. But as no such Agreement was proved, he thought this Transaction ought to be considered fraudulent with Regard to the Defendant; and therefore the Jury should find a Verdict for him; which they accordingly did.

Ward *against* Dunce and Norton.

Sittings at Guild-Hall. **I**N an Action of Trespass and false Imprisonment, for taking and detaining the Plaintiff two several Days, namely, the 28th of March last, and the 4th of April following, the Defendant Dunce pleaded a special Justification. As to the Imprisonment on the first of these Days, he pleaded that he was a Shoe-maker, and that the Plaintiff brought him six Skins of Shamois Leather to sell, that the Defendant examined him what Right he had to sell them, and that the Plaintiff informed him that he sold them for one Mr. Dunce, who happened to be the Defendant's Brother. The Defendant upon this sent for his Brother, and he told him it was an Imposition; and for this Reason this Defendant sent for the other Defendant Norton, who was a Constable, and the Plaintiff was taken into Custody by him, and carried to a Spunging-House for about three Hours. When the Plaintiff was at the Spunging-House, it was too late to carry him before a Justice of the Peace, it being about 9 of the Clock on the Saturday Evening, or for the Plaintiff to send for his Friends to shew how he came by the Goods. Upon the Plaintiff's Request he was discharged out of Custody for the present, upon his agreeing to leave the Goods with the Defendant's Brother, and promising to come again to the Defendant's Brother on the Monday Morning following; and then to justify his Right to the Goods, but he did not come according to Promise. As to the Imprisonment on the second of these Days, the Defendant pleaded that he sent for the other Defendant Norton, to retake the Plaintiff for his having escaped, and to carry him before a Justice of Peace, which was accordingly done. The other Defendant being a Constable pleaded Not guilty, as to the whole. This Cause coming now to be tried before the Chief Justice, the Justification on the first Day was fully proved, and the Chief Justice thought it to be a good one in Point of Law. But as to the second Justification he at first doubted, whether what the Plaintiff did could be called an Escape; however, upon farther Recollection he said, that when the Plaintiff was lawfully in Custody in the Hands of the Constable, he could not legally be discharged out of that Custody, but by a Justice of Peace; and therefore what the Plaintiff did was an Escape. But then he said, he could not be retaken for the Escape, but by a Justice of Peace's Warrant. For although for Necessity Sake, on Suspicion of Felony, the Law allows a Constable, or even a private Person to arrest another that is so suspected, without a Warrant; yet to justify a Retaking for an Escape, he thought such Warrant was necessary; and therefore inclined to think that the second Justification was bad. However, because upon the Plaintiff's Evidence the whole Transaction appeared to be done out of an honest Design, he directed the Plaintiff to go into the Proof of his Case, and said he would leave the Matter to the Jury. The Plaintiff went into his Proofs accordingly, and shewed that though the Plaintiff did not come to Mr. Dunce's Brother

How far a Prisoner may be retaken upon an Escape.

at the Time appointed, yet afterwards a Friend of his did come to him and fully satisfied him he was well intitled to the Goods. Mr. Duncie the Defendant was acquainted with this; but Norton knew nothing of it. Upon this the Chief Justice directed the Jury to find a Verdict for the Defendant Duncie upon the first Justification, against him upon the second; and to find a Verdict for Norton upon the Whole, which they accordingly did.

Proctor and others *against* King.

How far a
Contract
shall be sup-
posed to re-
late to New
Stile how far
to Old Stile.

Sittings at Guild-Hall. **I**N an Action brought upon a Policy of Assurance, the Case upon the Plaintiff's Evidence appeared to be in the Manner following. On the 17th of December last the Ship called the Friends Adventure sailed from Sevil in Spain laden with a Cargo of Oranges and Lemons. On the 23d when the Ship was out at Sea near the Island of Merlunc upon the Coast of Britany, a very great Storm arose and the Ship and Cargo were lost in it. However there was no Opportunity of giving Advice of it till the 3d of January following, and then a Letter was sent to one of the Plaintiffs giving an Account of it, which did not arrive till the 14th. Upon the 8th the Policy of Assurance was subscribed by the Defendant for 100 l. 10 per Cent. being to be allowed the Defendant in Case of a Loss; but by the Terms of the Policy no Account was to be given of the Value of the Loss by the Assured; and this Policy the Defendant subscribed for the Consideration of a Guinea and a Half only. Upon the Defendant's Evidence the Case appeared to be in this Manner. On the 4th of January Captain Mullens arrived with his Ship, which had sailed from Sevil likewise, and in Buttolph-Lane, which was the Place where the Plaintiffs who were Orange Merchants lived, immediately gave an Account, that the Plaintiffs Ship set sail two Days before him, and that Ship being a much better Sailer than his, and the Sea being at that Time exceedingly dangerous, the common Report about the Neighbourhood was, that the Plaintiffs Ship must certainly have been lost. It was sworn too by the Defendant's Witnesses, that at least they believed the Plaintiffs had heard of this Report at this Time, if not had it from Captain Mullens himself. Notwithstanding this Mr. Strafford, one of the Plaintiffs, who was Partner with the others in this Orange Trade, on the 8th of January went to Mr. Prade a Broker, and told him that he had received Advice from his Correspondent at Sevil, that his Ship had not sailed from thence the 22d of December, but that it intended to set Sail within a Day or two after that Time, and upon that desired his Broker to get a Policy of 100 l. subscribed for him upon that Ship. Mr. Strafford had this Letter in his Hand when he gave the Directions to the Broker, but did not read it to him, nor did the Broker look upon any Part of it. The Broker likewise omitted to ask any Questions, whether Mr. Strafford meant New Stile or Old Stile, when he said the Ship was not set out the 22d of December; but the Broker swore, that as there was

was no particular mention of New Stile he understood M^r. Strafford to mean Old Stile; and accordingly represented to the Defendant, that the Ship had not set Sail the 22^d of December, which he understood to be according to Old Stile, and the Defendant took him in that Sense likewise. The Plaintiffs in their Reply shewed, that the Post in going from Sevil to London is never less then 22 Days, and therefore as M^r. Strafford had his Correspondent's Letter in his Hand on the 8th of January, and told his Broker the Contents of it, he could not possibly mean any Thing but New Stile. And besides, upon Reading the Letter now in Court, it appeared, that the Plaintiffs Correspondent had given them Advice, that Captain Mullens had actually sailed at the Time the Letter was dated; so that the Plaintiffs might very well be supposed to have given Credit to their Correspondent rather than to Captain Mullens. Upon this State of the Evidence the Chief Justice directed the Jury, that if they were of Opinion, that M^r. Strafford gave such Information to his Broker as might naturally mislead him, then they should find their Verdict for the Defendant; but if on the Contrary they were of Opinion, that M^r. Strafford gave a common Account of this Matter, and such as the Broker ought to have understood in the Sense of New Stile, then they should find their Verdict for the Plaintiffs. The Jury were of this latter Opinion; accordingly the Plaintiffs had a Verdict and 90^l. Damages.

Term. Trin.

8 Geo. II. 1734.

Metcalf and Hayes.

How far the Court will make a Rule for referring a Scrivener's Bill to be taxed.

IN an Action brought by the Plaintiff for a Sum of Money due to him as Scrivener, M^r. Field obtained a Rule the last Day of the last Term for taxing his Bill. M^r. Abney and M^r. Strange moved now, that that Rule might be discharged; and for this Purpose produced an Affidavit, that all the Items of the Bill related to Business done by the Plaintiff as Scrivener, and not as Attorney; for which Reason they submitted it, that this Case was not within the Statute of 2 G. 2. 22. M^r. Marsh and M^r. Field argued on the other Side, and said, that the Plaintiff was admitted an Attorney immediately upon the making of that Act, as they believed all other Scriveners were, thinking that they were included within it. They observed farther, that many of the Items related to that which was the proper Business of Attornies, particularly, that for drawing Precipe and Concord of a Fine; and therefore, though the Plaintiff has sworn that he did not act in these Matters as Attorney; yet they submitted it this Case must be within the Meaning of the Act. And lastly, they took Notice, that when the former Rule was obtained, M^r. Strange had Notice given him of the Motion, and he defended it then; for which Reason it was too late now to move to discharge it. The Chief Justice said, that in the Nature of the Thing itself, he should have thought this Matter proper for the Examination of the Master, as many of the Items relate merely to the Business of an Attorney. But for the last Reason that has been mentioned, namely, that the Court made this Rule on hearing Counsel on both Sides, he thought clearly that it ought to stand; accordingly the present Motion was refused.

Jasper

Jasper and Grovener.

IN an Action brought against the Defendant as Executor to one, who was Factor to the African Company; Serjeant Wright had obtained a Rule last Term for enlarging the Time for pleading to the first Day of this Term, upon an Affidavit that the Defendant was seized with the Dead Palsy, so that he was not able to speak or write his Name, and likewise upon his agreeing that the Defendant should not in the mean Time give one Creditor a Preference in Payment to the other. Serjeant Wright moved now that this Rule might be farther enlarged to the first Day of next Term, upon an Affidavit that the Defendant continued under the same Disability, and likewise upon his consenting to the same Terms as he did before. Mr. Strange argued on the other Side, and said that the Defendant's Counsel had not given the Court any Reason to believe when the Defendant will be out of this Disability; and therefore there was no Ground for enlarging the Time for pleading farther. He likewise compared this Case to that of a Motion to put off a Trial; where the Court will not grant it, unless some probable Cause is shewn, that the Party's Witnesses will return in a reasonable Time. The Chief Justice said, that in the Case of Mr. Pitt, who was likewise an Executor, and disabled by the Act of God, in the same Manner as the present Defendant is, he remembered the Court of Chancery granted a Commission to put the Testator's Effects into the Hands of some other Persons; and he thought that would be the proper Application in the present Case. However, Judge Page and Judge Lee said, that if the Defendant's Counsel would consent peremptorily to try this Cause as of next Term, and so submit to the other Terms that were offered, they should think it would be a Reason for enlarging the Rule for pleading to the Time that has been desired; accordingly upon the Defendant's Counsel consenting to this, the Rule was enlarged till that Time.

How far the Court will give Liberty, or not, that the Rules for pleading shall be enlarged.

The King and The Justices of the Town of Shrewsbury.

MR. Abney coming now to shew Cause, it appeared to the Court that there was no Partiality in what the Justices did; accordingly the Rule was discharged. Vide antea 449.

N. B. In this Case Judge Lee said that this has been determined, that Justices of Peace are bound to sign a Poor's Rate, though they have legal Exceptions to it; and a Mandamus will lie for this Purpose. The Reason, he said, is, that till the Rate is signed, the Matter cannot be put into a Method of Trial.

The King *against* Nap and others.

How far an Affidavit is necessary to be taken Notice of in drawing up a Rule of Court.

SERJEANT Chapel moved, that a Rule might be made absolute for an Information in the Nature of a Quo Warranto going against the Defendants, to shew by what Authority they claimed to be Freemen of the City of Winchester. Mr. Strange on the other Side said, that as to two of the Defendants he should not oppose the Rule's being made absolute. But as to the others, the Cause that he shewed was, that the Election of these Defendants to their Freedom depended upon the Validity of the Election of the late Mayor; that a Rule indeed was made absolute for an Information in the Nature of a Quo Warranto against the Mayor, and that Rule was read, when this Rule for shewing Cause was obtained; but it does not appear by this Rule that any of those Affidavits, which the former Rule was obtained upon, was read at that Time. Mr. Taylor, who was Attorney for the Prosecutors, however did aver, that he had those Affidavits in Court, and they were both put in, at that Time it was not thought necessary that the Affidavits should be read. The Court said, that it was certain, that those Affidavits could not conclude the present Defendants, but they ought to have an Opportunity of answering them. For which Reason they thought that those Affidavits should have been inserted in the Rule; and because they were not, the Court discharged it.

The King *and* The Inhabitants of Crakmarsh.

Vide ante 198.

How far the Court will quash an Appointment of Overseers, or not.

AN Appointment of Overseers being returned upon a Certiorari, Serjeant Birch took two Exceptions to it; first, that it does not appear to be under the Seal of the Justices; secondly, that this Appointment of Overseers is for the Vill, not for the Parish of Crakmarsh. With regard to the first of these Exceptions the Chief Justice said, that where a Coroner's Inquest is sent up into this Court, he did agree the Seals of the Jurors must be affixed to it; because there the Original itself is sent up. But here the Transcript is only returned; and as it is said to be under the Hands and Seals of the Justices, he thought it sufficient. With regard to the second Exception he said, that though the Statute of 43 Eliz. 2. has been construed to extend only to Parishes; yet the Statute of 13 & 14 Car. 2. 12. (21.) has been held to extend to Extraparochial Places; and since that Statute that Overseers are to be appointed by the Inhabitants of those Places equally as they were before by the Inhabitants of Parishes at Large; and if they do not make such Appointment a Mandamus will lie to compel them to do it. Judge Lee said he remembered the Court was of the same Opinion in the like Case of this very Township, and there they founded their Judgment on the Case of The King and The Inhabitants of Stoke-Lane. Mr. Abney said too, in the Case of The King and The Inhabitants of Ruffard there was a Mandamus to the Justices of the County of Nottingham

ham to appoint Overseers, and they returned, that the Place was Extraparochial, but that Return was not allowed of. And he said the Court was of the same Opinion in the Case of The King and The Inhabitants of Belvoyer. Accordingly the present Motion was refused.

Hinshaw and Boyle.

IN an Assumpsit *M^r. Robinson* moved several Exceptions in Arrest of Judgment; first, that the Consideration was illegal, for this Purpose he said the Declaration set forth, that several Actions were commenced against *Williamson* by his Creditors in the Court of Macclesfield, and thereupon it is agreed between the Attorney for *Williamson* and the Attorney for the others, one of which the present Defendant was, that the Plaintiff should take the Goods of *Williamson* into his Possession; that he should be indemnified for so doing, and that in Case any Recovery should be against the Plaintiff for intermeddling with the Goods, it was agreed by the Creditors that he should be reimbursed by them in Proportion to their several Debts. *M^r. Robinson* submitted it, that Attornies can have no such Power over the Estate of their Client; and for that Reason the Consideration cannot be maintained. The second Exception was, that the Breach was insufficient. The Breach was, that *Williamson* commenced an Action against the present Plaintiff in the Court of Exchequer for taking these Goods, and recovered Damages against him on that Account; that the present Defendant had Notice of this Recovery; but that he did not pay those Damages nor any Part thereof; upon which *M^r. Robinson* submitted it, that this Breach was insufficient in as much as the Plaintiff had not set forth what the Proportion of the Defendant's Debt came to. The third was, that the Manner of the Recovery is not set forth; so that it does not appear, whether it was by Verdict or by Default. The fourth was, that in the Award of the Venire the *qui nec*, &c. is omitted. *M^r. Bootle* argued on the other Side. In Answer to the first Exception he did submit it, that though possibly the Client might have a good Remedy against the Attorney for making such an Agreement; yet if a Stranger meddles with the Goods in Pursuance of it he cannot be answerable; and for this Purpose cited *Wynch* 48, and *Hutton* 55. To the second he said, that the Breach assigned was, that the Defendant did not indemnify the Plaintiff from those Damages or any Part thereof; and that he submitted it was sufficient, especially since the Verdict had ascertained it. For which Purpose he mentioned *Sir Thomas Jones* 125. In Answer to the third of these Exceptions he cited 2 Cro. 10. And as to the fourth he observed, that at most it was but a Misentry of the Clerk, and therefore amendable by the Statute of H. 6. The Court thought none of these Exceptions material saving the last; but as to that the Rule was enlarged; that the Plaintiff might have an Opportunity to move for the Amendment. *Vide postea.*

When an Action is brought upon an Assumpsit, how far the Consideration shall be said to be illegal, or not.

Palucer and Cotton.

When an Award is void in part, how far it shall be said to be void, or not, in the Whole.

MR. Hussey and M^r. Strange came now to shew Cause, why an Attachment should not go for the Breach of an Award. In this Case the Award required the Defendant to do three Things; first, to pay the Plaintiff a certain Sum of Money; secondly, to pull down a Wall which he built upon the Plaintiff's Ground; and thirdly, to pay the Arbitrators a certain Sum of Money for their Expences in their several Attendances. Then the Words of the Award followed, That on Performance of the aforesaid Matters the Plaintiff, should give the Defendant a General Release. The Counsel said, that with regard to that Part of the Award which related to the Defendant's paying the Arbitrators a Sum of Money, it was clearly void; and in as much as the Release, which was the only Act to be done by the Plaintiff was not to be given till that Sum of Money was paid by the Defendant as well as the other Acts performed by him, they submitted it the whole of this Award was void likewise. For this Purpose M^r. Hussey mentioned the Case of Barnardiston and Poulger, Hil. 12 Anne. Two Exceptions were there taken to the Award; first, that the Submission was of all Matters in Difference which Barnardiston had with Poulger and Love, and the Determination by the Arbitrators was only of such Matters in Difference, which Barnardiston had with Poulger only. The 2^d Exception was, that the Rent was ordered to be paid on the 23^d, but that it was not due till the 24th. In that Case he took the Opinion of Lord Chief Justice Parker to be, that the last Part of this Award was void, and as there was a Release to be given on Payment of the Money aforesaid, he was of Opinion that the whole Award was void likewise. But in the present Case, if this was not a sufficient Reason for setting the Award aside, at least it was hoped that it would be sufficient to influence the Court not to enforce the Award by Attachment. For this Purpose M^r. Strange mentioned the Case of Sir Thomas Hails and Taylor, where the Court was of this Opinion. And lastly they observed, that they had an Affidavit that they had actually tendered the Money to the Plaintiff that was due upon the Award, and that they were ready to pull down the Wall, provided the Plaintiff would be bound to enter into a Rule of Court not to bring an Action of Trespass against the Defendant for so doing. They said there was good Reason for insisting upon these Terms; because the Plaintiff had actually intimated that he would bring Trespass against the Defendant for doing this. The Chief Justice said, these were reasonable Terms to be agreed to. Accordingly upon the Plaintiff's agreeing to them, the Rule was made absolute for the Attachment; but Directions given, that it should lie in the Officer's Hand, and not be executed at all, provided the Defendant should pull down the Wall within a Month's Time.

Goodtitle and Bourdoy.

ON Rule to shew Cause why an Issue should not be amend. ed in Ejectment, wherein the Defendant's Name was repeated instead of the Plaintiff's, Serjeant Darnel said, that he should not oppose the Rule's being made absolute provided it was on Payment of Costs. But he submitted it, that Costs they were well intitled to. For when this Cause came down to Trial, the Defendant's Counsel took the Exception, that there was no Issue joined, and thereupon the Judge refused to try the Cause. By this Mistake of the Plaintiff the Defendant had lost a Trial; therefore according to the Common Rule of the Court he conceived they were intitled to Costs upon the Amendment. Serjeant Baynes argued on the other Side, and said that notwithstanding this Exception was taken at the Trial, the Plaintiff's Counsel offered to proceed, the Defendant's Counsel themselves were unwilling to go on, and therefore there being no Trial was owing to the Defendant's Choice, and in such Cases he submitted it, that no Costs ought to be granted. To this Purpose he mentioned a Case that was in this Court in Replevin, where there was a Mistake of the Clerk, and for that Mistake a Demurrer and a Joinder in Demurrer; and after this Serjeant Knot moved to amend, and the Court allowed it without Payment of Costs; and to the same Point he cited 2 Lev. 117. The Chief Justice and Judge Lee said, that they thought that the Case that was cited on Serjeant Knot's Motion could not be maintained for Law, unless Costs were granted; and in the Principal Case the Court were all of Opinion, that the Plaintiff ought to pay Costs; accordingly on those Terms the Rule was made absolute.

How far the Court will give Leave, or not, that an Issue shall be amended in an Ejectment.

Anonymus.

ON Rule to shew Cause why Goods taken in Execution should not be restored, it appeared that Part of the Goods were Notes and Bonds. The Chief Justice said that it had been never determined, that Bank Notes, though assignable, could be taken in Execution. He said till the late Statute it was not Felony to steal them. Judge Page said that he always thought that Deeds and Writings could not be taken in Execution, and the rest of the Court were of the same Opinion.

When Goods are taken in Execution, how far the Court will direct, or not, that the Goods shall be restored.

The King *and* Bartlet.

Vide antea
400.

THIS Matter coming on again, Mr. Strange said, that there was but one Exception now remaining of any Difficulty with the Court, and that was concerning the Allowance of the Disbursement he appealed from, viz. The Disbursement of Churchwardens and the Allowance thereof; as to this he submitted it in the first place, that the Sessions had an original Jurisdiction; for the Words in the 6th Section of 43 Eliz. give the Sessions a Power to determine all Matters done in Pursuance of that Act, whether the Party finds himself aggrieved either by the Act of the Churchwardens or by the Act of the two Justices. But what he principally relied upon was, that supposing the Application to two Justices was first of all necessary, yet in the present Case it sufficiently appeared, that there was a previous Application made to them; and the Allowance of the Disbursement shall be intended to have been by the two Justices. For this Purpose he said, that by 5 Eliz. 4. the Justices have a Power to order Masters to pay their Servants Wages in Husbandry; but they have a Power of ordering those Sort of Wages only. Yet general Orders to pay Servants Wages have always been held to be good, without specifying the Wages to be due in Husbandry. In the Case of The King and The Inhabitants of Bitham, Hil. 7 Geo. 1. it was stated in an Order of Removal, that A. was appointed to be Collector of Burials, and lived in a Parish as Collector; the Court held that a good Settlement, though it was not stated in the Order, that he was appointed Collector for a Year; because they said they would intend him to be so in as much as the Statute of 6 & 7 W. 6. (20) required it. But what comes nearer to the present Case was that of The King and The Inhabitants of Ordmanbury, Trin. 4 Geo. 1. where an Order appeared to be made upon an Appeal; but not said to be on an Appeal of the Party grieved; yet that was held to be sufficient. Judge Lee said, that in Carthew 158. it is held upon the first Clause of this Statute of Eliz. that an Application must be to two Justices before the Parties can come to the Sessions; and he thought there was equal Reason for the same Construction upon the second Clause in this Statute relating to the Disbursement. And as to the 6th Section the Chief Justice and he agreed, that the Words must be taken distributively. Then as to the second Observation made by Mr. Strange the Chief Justice said, that the setting forth this Matter concerning the Allowance of the Disbursement is Matter of Jurisdiction; and therefore the Court must require strict Certainty. But in the present Case he said it is far from being necessarily to be intended, that the Justices did make this Allowance, because the Parishioners themselves may allow it in some Cases, namely, by acquiescing under it. The Case of Wages the Chief Justice did agree, because the Words of the Statute are there followed. Judge Lee said that the Case of The King and The Inhabitants of Ordmanbury deserved to be looked into; but for the present he said he

inclined to be of Opinion with the Chief Justice. The rest of the Court were of the same Opinion; however the Rule was enlarged, that that Case might be looked into.

Clerk and Crow.

ON a Writ of Error on a Judgment in the Common Pleas, this appeared to be an Action brought on Articles, by which the Defendant agreed not to exercise a certain Trade within the Weekly Bills of Mortality. Mr. Bicknal said, that such Agreement was determined to be good in the Case of Jaspen and Lamper, Hill. 13 Geo. 1. and likewise in the Case of Michel and Reynolds; for which Reason the Court affirmed the Judgment directly.

How far an Agreement which is made in Restraint of Trade shall be said to be binding, or not.

Shepherd and Brand.

ON Rule to shew Cause, why an Award should not be set aside, several Exceptions were taken to it; but the Court over-ruled them all, excepting one, which was, that before the making the Award the Arbitrators insisted upon three Guineas apiece to be paid them by each of the Parties for their Trouble and Expences. The Defendant refused doing it on his Part; upon which the Plaintiff paid the whole Money. The Court said that they thought it might be something dangerous to suffer one Side only to give Money to Arbitrators; accordingly for that Reason the Rule was made absolute.

How far an Award shall be set aside, or not, by Reason of the Arbitrators receiving Money for making their Award.

Hore and Gates.

THIS Matter coming on again, Mr. Parker argued for the Plaintiff; he submitted it, that the Averment of the Bill of Middlesex being sued out in the Vacation could not be maintained. To this Purpose he cited the Case of Rouse and Ball, Hill. 1 Geo. 1. Rot. 47. That was an Action upon a Bail-Bond, wherein the Plaintiff declared, that the Party was arrested the 27th Day of August 1714, by Virtue of a Process returnable coram Domino Rege, the first Return of Michaelmas Term. To this Declaration there was a Demurrer, and upon Argument it was objected that this Process appeared to be taken out in the Vacation, and consequently void; for the Demise of the late Queen was not till after Trinity Term in that Year, and the Process being made returnable before the King, it thereby appeared that it must have been taken out in that Part of the Vacation, that was after the Demise of the Queen; and upon this Exception being taken, the Plaintiff moved to discontinue. To the same Purpose he cited the Case of Buckeridge and Wright, Hill. 12 Geo. 1. That likewise was an Action upon a Bail-Bond; the Writ upon which the Bail-Bond was given, appeared to be taken out in the Vacation, and the Court held the Writ to be void, and consequently the Bail-Bond likewise. Mr. Strange argued

Vide antea 319.

argued on the other Side, and said that he did agree that the Term and Vacation are to many Purposes considered but as one Day in Law. But this is only a Fiction; and therefore shall hold, or not, according as it is right that it should do so. For this Purpose it has been held, where an Arrest was made in Vacation, without suing out a Process, and afterwards Process sued out tested of the Term preceding, that should not make the Arrest to be legal; and so it is resolved in *Sir Tho. Jones* 142. *Ray*. 161. 2 *Keb.* 173, 198. and 3 *Keb.* 213. To the same Purpose he cited the Case of *Waring and Newbury*, *Trin.* 4 *G.* 1. There a Landlord died intestate, and Execution was taken out against the Tenant; after that, Letters of Administration were granted; and then Motion was made on Behalf of the Administrator, that a Rule might be made upon the Sheriff to pay a Year's Rent to him out of the Goods taken in Execution. But the Court refused the Motion; because a Relation should not devest a legal Interest; though it was agreed in that Case, that such Administration shall maintain Trover for Goods taken away before the Letters of Administration granted; in as much as the Relation there is only to punish a Tort. But this Matter he said was more clear since the Statute of 5 & 6 *Will. & Ma.* 21. (4.) which requires the particular Day to be marked upon the Writ when the Process is sued out. And besides, he said, the Statute of Limitations expressly requires that the Actions shall be sued out as well as commenced within the six Years. The Commencing the Process may indeed signify only the Awarding of it; which in the Nature of the Thing must be supposed to be done in Term-Time *sedente Curia*; but the Suing it out can signify only the actual Bespeaking it of the Officer; for which Reason this is necessary to be done within the six Years, as well as the other; whereas in the present Case it is expressly averred by the Record, that this was not done within that Time. The Chief Justice said, that his Opinion was, that the present Averment could not be admitted. The Suing out a Bill of Middlesex was only making a Copy of the Award itself upon the Roll; and the Attempt of making such an Averment, either in Suit by Original, or Suit by Bill, does not appear to have been once made since the Time of the Statute, which is One hundred and eleven Years. That such an Averment could not be made, he said, was expressly taken for granted in the Argument of *Mr. Holt*, reported by *Sir Thomas Jones* before-mentioned; and that it could not be allowed, he thought the Case of *Eastwick and Coke* was a strong Authority. Judge *Lee* said, in the Case of *Parsons and Gill*, *Mich.* 13 *Will.* *Gill* acknowledged a Judgment, which was signed the 2d of April; on the 9th following he died, and afterwards Execution was taken out against his Goods tested the 23d of January before. Serjeant *Broderick* moved to set this Execution aside; but the Court refused it, in as much as the Writ was actually taken out before the Signing the Judgment; for which Reason, as this Fiction of Law is so well known, he thought it might well be supposed to agree with the Intent of the Legislature, that the Plaintiff should not be debarred of his Action till the End of the Vacation after the six Years. The rest of the

the Court were likewise of the same Opinion, upon which Mr. Strange excepted, that the Continuances of the first Writ were not regularly entered; accordingly the Matter stood over at present, that this Affair might be looked into. *Vide postea.*

Smith and Hickson.

IN an Action for a malicious Prosecution, the Plaintiff had declared that the Defendant maliciously prosecuted an Indictment against him and his Wife for receiving stolen Goods, knowing them to be stolen, to the Prejudice of the Husband and the Wife, whereby they lost their good Name and Reputation; and likewise the Plaintiff alleged, that thereby he suffered much in his Trade of a Taylor, to his Damage, &c. To this Declaration the Defendant pleaded Not Guilty; and the Jury found that the Prosecution was not malicious as to the Husband, but was malicious as to the Wife; and thereupon they gave 40 s. Damages. Serjeant Eyres moved now in Arrest of Judgment, and took two Exceptions; First, that the Wife ought to have been joined with the Husband in this Action. And secondly, admitting that not to be necessary, yet the Plaintiff could not recover; because he has declared that the Prosecution was malicious as to them jointly, and the Jury found it to be malicious as to one of them only; and in Support of this last Exception, he cited 1 Lev. 299. 2 And. 48. and 3 Cro. 147, 157, 524. Serjeant Chappel argued on the other Side, and with Regard to the first Exception said this Point is determined in Favour of the Plaintiff, in Sir William Jones 440. reported likewise in 1 Cro. 553. In Answer to the second Exception he said, that in Actions founded upon Tort, wherever there is sufficiently found by the Jury to prove an Injury by the Defendant, the Judgment shall be against him; and therefore the present Case is very distinguishable from those that are cited. The Chief Justice said, that in the Case of Savil and Roberts, Salk. 13. Lord Holt was indeed of Opinion that an Action would not lie for maliciously preferring an Indictment, unless the Indictment contained in it a Charge of a scandalous Nature. But in the Case of Jones and Gwynn, which was an Action brought for maliciously preferring an Indictment on the late Statute concerning Chapmen and Badgers, Lord Macclesfield and the whole Court denied that Case to be Law; and therefore it must now be taken to be a settled Point, that an Action will lie for maliciously preferring an Indictment of any Sort. In the present Case, the Indictment did certainly contain a Charge of a scandalous Nature, and as to that, the Question in the first Place is, whether it was necessary that the Wife should be joined in this Action. As to that he did agree, that in an Action for Words spoken against the Wife, she must be joined; but in the present Case she need not; because by preferring this Prosecution against the Wife as well as the Husband, there might be a special Damage to the Husband by this Means; and therefore this Case may be resembled to that of a Battery committed on the Wife, per quod the Husband consortium amittit.

When an Action is brought for a malicious Prosecution, what shall be said to be a good Commencement of such Action.

With regard to the second Exception he thought Serjeant Chapel had answered that likewise. The rest of the Court were of the same Opinion. Accordingly the Rule was discharged, that had been obtained for bringing in the Postea.

The King and Lloyd.

Vide ante 302.
310. 330.

MR. Dennison now argued on behalf of the Defendant. He said he should confine himself singly to that Exception, that the Evidence was not set forth. In Cases of Convictions before Justices out of Sessions, he believed it would hardly be contended at this Time of Day but that it was necessary to set it forth. In the Case of The King and Baker, Trin. 6 Geo. 1. this was solemnly settled. Some Doubt he said had been made, whether in the present Case this was to be considered a Conviction; and for this Purpose the present Case has been compared to Orders of Bastardy; and if this Case was compared to that, he would readily agree the present Exception could not avail. To this Purpose was the Case of The King and Blackwell, which was an Order of Bastardy; but held that a Summons, though necessary, need not be specified. But the present Case he submitted it differed from that; because in this the Defendant is to lose his Freehold. He submitted it therefore, that the Determination of the Justices below in the present Case must in all Respects be considered a Conviction; and if so the only Doubt remaining would be whether a Conviction at the Sessions differed in this Respect from a Conviction of Justices out of it, he conceived that it by no Means did. In the Case even of Superior Courts he said, the ancient Rule of Law was, that where those Courts were Judges of the Fact, as in some Cases they were, the Evidence on which they founded such Judgment, was necessary to be set out. To this Purpose he mentioned the Case of a Trial by Witnesses in Writ of Dower; and for this cited 1 And. 20. the Record of which Case is in Rastal 228. The same is it in the Case of proving a Suggestion in Prohibition; the Oath of the Witnesses is set out on the Record; and for this he cited Co. Ent. 363. Rast. 444. and 3 Cro. 736. He conceived therefore, that the only Reason why the Court has held it necessary to set forth the Evidence in Convictions of Justices out of Sessions has been, that this has been the ancient Practice of Superior Courts in Cases of the like Nature; and if so there was exactly the same Reason, that this should be necessary in Convictions of Justices in Sessions. Mr. Strange argued on the other Side, and said that he conceived this was to be considered merely as an Order. He said these Matters have always been allowed to be in English, which Convictions never were, and he could by no Means distinguish the present Case from that of an Order of Bastardy, but supposing this should be considered a Conviction; yet still he submitted it the Exception ought not to prevail. For this Purpose he mentioned the Case of The King and Ford, Trin. 9 Geo. 1. That was a Conviction on the Statute of 3 Car. 1. for keeping an Alehouse. Excepti-
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on was taken, that by the Words of that Statute the Justices had no Jurisdiction, where the Party is punished before by the Statute of Edw. 6. and that it did not appear in that Case, but that the Defendant had been punished on the former Statute. But notwithstanding this Exception, the Conviction was confirmed. So in the Case of The King and Thebe, Mich. 11 Geo. 1. that was a Conviction for obstructing Excise Officers in the Execution of their Office. Exception was taken, that it did not appear the Obstruction was in the Day-Time, and if it had been in the Night there ought to have been a Constable present. But the Court held that Conviction to be good. So in Convictions upon the Oath the Justice adjudges the Party not qualified, that Adjudication is good; though if in the Evidence of the Witnesses set out it be alledged in that Manner, that is not sufficient, because they ought to swear how he is not qualified. These Cases he said were all of them probable Arguments, that supposing this to be a Conviction at the Sessions the Evidence need not be set out, but a more direct Proof of this was, that in all the Cases of Removals of Clerks of the Peace that have been upon this Statute, the Evidence has not been set out. For this Purpose he mentioned the Case of The Queen and Baines, Salk. 680. that of The Queen and Horwel, Mich. 11 Ann. and that of The King and Harland. He said the Court had always had a regard to that which has been the constant Course and Forms of Proceedings, and that is the Reason why in Writs of Excommunicato capi-endo where there is no other nominative Case before the Words Excommunicatus est but the Official or other Officer of the Spiritual Court; yet that Form of the Writ has always been held to be good. The Chief Justice said, that there were two Reasons which determined him to be of Opinion that it was not necessary the Evidence should be set out in the present Case. In the first place, he took this to be an Order equally as that of Bastardy is; and in the next Place the Authority of the Case of The Queen and Baines. As to the first, he said an Order of Bastardy is an Adjudication, which may be followed with a Punishment; and the present Adjudication is no more. As to the Case of The Queen and Baines he did agree, that the Order that was made in that Case was quashed, and that this Exception was not directly taken, but he said it was a Case that received the most serious and solemn Examination. The Order was first removed up by one Certiorari, Exceptions taken to it, and the Order quashed. Another Order was made, that removed up by Certiorari, and several Exceptions taken to it. The Opinion of all the Judges of England were taken upon it. Then the Matter was argued again by all the Judges of this Court; and therefore, as this Exception was not taken in that Case, he thought that a strong Authority that it could not. As to the Case of The Queen and Horwel, he did agree, that this Exception was taken there by Lord Letchmere, when he was Solicitor General. Serjeant Pengelly of Counsel on the other Side relied upon the Case of The Queen and Baines in Answer to it. The Court there gave no Opinion as to that Point; however said that if there was

was a material Exception in the Case of The Queen and Baines, that was not taken, but might have been taken, they would consider of it. Upon that the Matter stood over in that Case; and the Defendant died before farther Argument. The Chief Justice however said, that for the Reasons before given he was of Opinion that the Exception ought not to be allowed. Judge Page agreed the same, but he thought this was a Conviction; and his Reason why the Evidence need not be set forth was, that this was a Conviction at the Sessions; and not by Justices out of it. Judge Probyn and Judge Lee were likewise of Opinion that the Exception ought not to be allowed; but their Reason was that this was to be considered as an Order; and Judge Lee cited the Case of The King and Venables, Trin. 11 Geo. I. which was an Adjudication for suppressing an Alehouse for Disorders; and the Court held in that Case that the Summons was not necessary to be set forth, being of Opinion that that was only an Order. However in the present Case the Court said that they would not now deliver their Opinion, but did not desire that the Matter should be spoke to again; upon which Mr. Marsh said he was retained for the Defendant. But the Court said they should not expect to hear a farther Argument, unless he should in a few Days declare, that he had some Thing material to offer. *Vide postea.* *This case afterwards in Mich. term 8. Geo. 2. received the final Opinion of the Court which was, that the Verdict should be compromised. See the other reports of this case.* The King and Brooks.

Vide ante
449.

THE Defendant's Clerk in Court having now had a Sight of the Postea, Mr. Abney and others that were of Counsel for him, took several Exceptions. First, that in the Postea the Cause is said to be tried before our Justices at Lancaster, and it does not appear what those Justices were. Secondly, that the Return to the Venire is not said to be made by such a one Sheriff; but the Name of his Office is omitted. Thirdly, that the Name of one of the Jurors was different in the Venire from what it was in the Distringas; the Name being John Hill in the Venire and John Kell in the Distringas. And to support this Exception, was cited the Case of The King and Willis, Mich. 2 Geo. 2. and that of The King and Brown, the same Day, both determined to this Purpose. Fourthly, that the Distringas required the Sheriff to have the Names of the Jurors there instead of their Bodies. Fifthly, that the Venire was to try an Issue in a certain Information in the Nature of a Quo Warranto; but did not describe what the Nature of the Right was, which was to be tried. Sixthly, that there was no Description neither of the Nature of this Right in the Panel. Seventhly, that the Form of the Oath was who say the Truth elected sworn, without saying being elected. And lastly, that the Names of the Jurors are said to be impanelled and not panelled. On these Exceptions a Rule was made to shew Cause. *Vide postea.*

Hensham and Boyle.

MR. Bootle, Jun. now moved as a Motion of Course for Liberty to amend the Entry of the Award of the Venire, and that without Costs; and for this Purpose cited 3 Mod. 112. and the Case of Wilkinson and Mayer, East. 10 Geo. 1. there the Entry was tam ad triand' quam ad inquirend'; Motion was made to strike out the Words quam ad inquirend' and granted without Costs. The Chief Justice said he believed this might be done without Costs. However as no Notice was given of the Motion, they must make a Rule to shew Cause, which they accordingly did.

Vide ante.

Burton and Badly.

IN Ejecment tried before Mr. Baron Price at Nottingham Assizes 1732, a special Verdict was found to the Effect following. The Jury find that Roger Altham, Doctor of Divinity, possessed of the Lands in Question in Right of his Prebendary; on the 13th of June 1712 demised the same to Sir William Owsley, Bart. for three Lives; and on the 11th of March 1714, Sir William Owsley mortgaged the same to Anne Robinson, and the said Anne assigned the same to John Green, Lessor of the Plaintiff. But the Jury farther find, that on the 10th of June 1712, three Days before the Lease made to Sir William Owsley, Sir William Owsley acknowledged a Statute Staple to Sir William Jolliff; on the 12th of March following Sir William Jolliff sued out an Extent against Sir William Owsley; and on the 4th of May 1717, an Inquisition was taken upon it. On the 14th of the same Instant a Liberate issued directed to the Sheriff of Stafford, who returned a Seizure of the Goods and Lands of Sir William Owsley in Pursuance of it. On the 12th of December following another Writ of Extent issued by Sir William Jolliff against Sir William Owsley directed to the Sheriff of Nottingham, upon which an Inquisition was taken the 30th of that Month, and in Pursuance of a Liberate the Lands in Question were delivered to Sir William Jolliff the 23d of October 5 Geo. 1. Sometime after this Sir William Jolliff preferred a Petition to the Lord Chancellor, desiring Liberty to enter a Prayer of the second Extent of the same Day which the first was, and on the 21st of January 7 Geo. 1. the Chancellor made an Order, that Sir William Jolliff should enter such Prayer as he should be advised. Accordingly this Prayer was afterwards entered, and under the second Extent the Defendant claimed. On behalf of the Plaintiff Mr. Abney submitted it, that upon this Record there unquestionably appeared a good Title in the Plaintiff, unless it was defeated by a Prior one in the Defendant. But to make the Defendant's Title good, it was necessary the Extent should be shewn to be legal, which he conceived was far otherwise. He did agree, that two Extents may be taken out in different Counties at the same

How far a
Writ of Ex-
tent shall be
said to be le-
gal, or not.

Time ; but otherwise where one Extent is taken out first of all, and afterwards another, all the Goods and Lands that were taken upon the first Extent must be evicted, and likewise a Scire facias taken out before the second Extent can be made good. And for this Purpose he cited 1 Roll's Rep. 8. 2 Cro. 338. 3 Cro. 310. Sid. 356. and 1 Lev. 92. He did agree that the Design of the Order was to supply this Defect by entering the Prayers of both the Extents as of one and the same Instant. But he conceived this Order to be absolutely Illegal. The Chief Justice said that this Court could not inquire into the Legality of that Order in a collateral Action. If the Order was Wrong it ought to have been set aside in a proper Manner. He said the Court could only consider the Prayer of the Extent as it stands upon the Record, and compared it to the Case of a Judgment entered *nunc pro tunc*. The rest of the Court were of the same Opinion. Accordingly Judgment was given for the Defendant.

Cooper and Mapson.

Vide ante
444.

THIS Matter coming on again, to make the Recognizance good, Mr. Bootle cited Plowd. 109. Sid. 456. 2 Saund. 788. 1 Mod. 85. and Salk. 463. The Chief Justice and Judge Probyn said that they thought that the Word happen might be understood after the 2d Word not, and then the Sentence would be right. Accordingly Judgment was given for the Plaintiff.

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